Supreme Court, U.S.
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No. 00-1337

In the Supreme Court of the United States

UPPER ARLINGTON CITY SCHOOL DISTRICT BOARD OF EDUCATION, et al.
Petitioners,

v.

JOSEPH JAMES, a minor by and through his parents, Nancy James and Cameron James; NANCY JAMES; CAMERON JAMES,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether parents of a disabled child may maintain a cause of action against a public school district for tuition reimbursement under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. ("IDEA"), when the parents did not give prior notice to the school district of their intent to begin seeking reimbursement from that school district for the tuition of the private school in which the parents unilaterally placed their child.

2. Whether a public school district has an obligation to develop an individualized education program (IEP) under the IDEA for a child with disabilities whom the parents have unilaterally placed in a private school when the parents have neither enrolled the child in the public school nor asked for an IEP.

PARTIES TO THE PROCEEDING

Petitioners

Upper Arlington City School District (Franklin County, Ohio), Upper Arlington City School District Board of Education, William Schaefer, superintendent, Linda Ready, school board president, Edward Seidel, Mark Sheriff, Thomas C. Wilson, III, and Steve Sikora, school board members.

Respondents

Joseph James a minor, by and through his parents, Nancy James and Cameron James, and Nancy James and Cameron James, on their own behalf.

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I. STATEMENT OF THE BASIS FOR JURISDICTION

The judgment of the court of appeals was entered on September 28, 2000. (App. A at 1a.)[1] Petitioners' timely petition for rehearing with suggestion for en banc review was denied on November 20, 2000. (App. C at 34a.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

II. RELEVANT STATUTES AND REGULATIONS

This case is brought under the Individuals with Disabilities Education Act (IDEA). Pertinent provisions of the IDEA and relevant regulations are set forth at App. D at 36a-61a.

III. STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Court Disposition

This is an action for tuition reimbursement under the Individuals with Disabilities Education Act. The Jameses unilaterally withdrew their son Joseph (Joe) from the Upper Arlington City School District (school district) in 1989 and placed him in a private school. In 1994, the parents had a conversation with the district's director of special education about the possibility of Joe's return; however, Joe remained in a private placement. His parents brought an administrative complaint under the IDEA, called a due process request, in

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[1] All references to the appendix will be designated by "App."

1996 for retroactive and prospective tuition reimbursement for Joe's private school education. The state impartial hearing officer and state level review officer dismissed the parents' claims without an evidentiary hearing, holding that the parents should have brought their due process request before unilaterally withdrawing their child.

The parents appealed the IDEA action to federal district court and also brought claims under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and 42 U.S.C. § 1983. The district court granted judgment on the pleadings, holding that the statute of limitations had run on the parents' claims and they were precluded from seeking reimbursement since they had unilaterally changed their son's educational placement without initiating the administrative due process procedures.

The Sixth Circuit Court of Appeals, in a 2-1 decision, affirmed that the parents' claims under Section 504 of the Rehabilitation Act and 42 U.S.C. § 1983 were time barred and the parents could not maintain an action against the superintendent of schools and the individual board of education members. James v. Upper Arlington City Sch. Dist., 228 F.3d 764, 769 (6th Cir. 2000). (App. A at 1a.) The court also affirmed that the parents could not maintain an action under the IDEA from 1989 through 1994. Id. at 770. (App. A at 10a.) The majority, however, reversed the district court decision and held that the parents could maintain an IDEA cause of action from the time they approached the school district in 1994 forward. Id. The court denied the petitioners' petition for rehearing with suggestion for en banc review. (App. C at 34a.)

B. Statement of Facts

Joe James attended elementary school in the school district from 1985, his kindergarten year, to 1989, his fourth grade year. He was found eligible for special education services under the IDEA in the spring of 1987, and individualized education programs (IEPs) were developed each school year thereafter. Growing concerned about the school district's programming for Joe, the parents unilaterally withdrew him in November 1989 and placed him in a private special education day school, Marburn Academy, where Joe remained through the 1991-1992 school year. The parents did not initiate a due process request against the school district when they first withdrew him nor did they ask that the school district reimburse them for the private school tuition. During the 1992-1993 school year, Joe attended The Gow School, a residential school working with children with dyslexia. From September 1993 through the date of their complaint, Joe attended The Kildonan School, a residential school located in Amenia, New York.

The parents had actual notice of their rights to a due process hearing under the IDEA in 1987. Despite being aware of their rights, the parents did not bring a due process request until May 1996. In that due process request, the parents demanded reimbursement for all prior private school expenses and tuition for the next school year.

The parents had minimal contact with the school district from 1989 to 1996. In reversing in part the district court decision, the Sixth Circuit Court of Appeals focused on the Jameses' communications with Sherry Meadows, the school district's director of special education, in 1994. Although the parents' complaint is 207 paragraphs long and

contains 110 pages of exhibits, only one paragraph is devoted to their conversation with Dr. Meadows:

> 131. In 1994, after Joe completed his first year at Kildonan, his parents met with Sherry Meadows, the Upper Arlington School District's Director of Special Education, and discussed Joe's possible return. Meadows told the parents: "Don't bring him back now, give me a couple of years to get someone trained."

The Jameses make no further claims about their communication with Dr. Meadows. They do not allege that they requested that the school district evaluate Joe in 1994 or that they asked that an IEP be written for the 1994-95 school year. They do not allege that they requested the school district either provide educational services within the school district or reimbursement for their tuition costs at the private schools. They do not allege making a due process request in 1994. In fact, they brought their due process request almost two years later, in May 1996.

IV. ARGUMENT

A. The Decision Below Regarding Parental Rights to Tuition Reimbursement Warrants Further Review.

1. Framework for tuition reimbursement cases set forth by the Act and this Court.

The IDEA at 20 U.S.C. § 1415(a)[2] requires state and local educational agencies "to assure that children with disabilities and their parents or guardians are guaranteed procedural safeguards with respect to the provision of a free appropriate public education." (App. D at 39a.) These procedures include the rights of parents to participate in the development of an IEP and to challenge a proposed IEP in administrative and court proceedings. 20 U.S.C. §§ 1401(a)(19), (a)(20); 1415(b), (d), (e). (App. D at 36a, 39a-45a.)

During the pendency of any challenge, a child is to "remain in the then current educational placement." 20 U.S.C. § 1415(e)(3). (App. D at 42a.) In School Comm. of Burlington v. Department of Educ. of Mass., 471 U.S. 359 (1985), the parents brought a due process request on July 3, 1979, challenging a school district's proposed IEP for their child. In September 1979, the parents unilaterally placed their child in a private school. The parents sought reimbursement for the private school tuition costs. This Court held that although the parents had violated § 1415(e)(3) by unilaterally changing their child's current educational placement, they had not waived their rights to reimbursement. Id. at 372. The Court held that the equitable relief available under the IDEA allows a court "to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that

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[2] Amendments were made to the IDEA in 1997. The parties have agreed that the amended provisions do not apply in this case. The statutory and regulatory sections cited herein are the pre-amendment provisions unless otherwise noted. Petitioners discuss the amendments only to inform the Court that the amendments do not affect the questions presented in this petition.

such placement, rather than a proposed IEP, is proper under the Act." Id. at 369.

In Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15 (1993), the parents also placed their child in a private school after they initiated a due process proceeding. This Court held that the parents could be reimbursed for their private school tuition costs even when that private school did not meet all the technical requirements of the IDEA to provide a free appropriate public education. Id. at 13-15. The Court held that parents are entitled to tuition reimbursement if a court finds "that the public placement violated IDEA and that the private school placement was proper under the Act." Id. at 15.

In both Burlington and Florence County, the parents first brought their due process requests and then unilaterally placed their children in private schools. The school districts were already aware that the parents disagreed with the proposed IEPs when the parents took matters into their own hands. Accordingly, this Court has not had the opportunity to address a case like James in which the parents first withdrew their son and then brought their due process request.

2. This Court's review is necessary because the decision below conflicts with decisions of other United States courts of appeals.

Since Burlington and Florence County, the lower courts have struggled to determine what obligations, if any, parents have to bring their concerns about their child's education to the public school's attention before resorting to self-help in the hope of reimbursement. With its opinion in

James, the Sixth Circuit is now in conflict with the Second, Third, Eighth and Ninth Circuits and with dicta from the First and Fourth Circuits.

In James, the court held that the parents accrued a cause of action in 1994 as a result of their limited conversation with Dr. Meadows, the director of special education. The court also held, "Nor does the failure to request a due process hearing in 1994 vitiate the cause of action that accrued in 1994." James, 228 F.3d at 768. (App. A at 7a.) The parents did not adequately communicate with the school district in 1994 so as to accrue a cause of action for reimbursement. The parents do not make allegations in their complaint that satisfy any of the standards set forth in decisions of the other United States courts of appeals. They do not allege that they requested that the school district provide services to Joe or that they had an expectation that the school district begin reimbursing them for their private tuition costs. All they allege is that they "discussed Joe's possible return." They had an obligation to communicate their expectation that the school district be responsible for their child's education and then they had to give the school district an opportunity to respond. The Jameses' complaint does not contain any allegation that they did that in 1994. The Sixth Circuit Court of Appeals was in error and in conflict with other United States courts of appeals.[3]

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[3] Perhaps because it was uncomfortable with the lack of communication between the parents and Dr. Meadows, the majority in James erred in characterizing the allegations in the complaint. The majority stated: "[T]he Jameses made contact with the school system about returning their son in 1994 and having a new IEP done" and "[t]he excusable state of affairs apparently came to an end in 1994 when the parents specifically approached the school district about re-enrollment and obtaining a new IEP, even though

The Third Circuit Court of Appeals has placed more obligations on parents to communicate than the Sixth Circuit did in James. In Bernardsville Bd. of Educ. v. J.H., 42 F.3d 149 (3rd Cir. 1994), the Third Circuit held that parents have a duty to "unequivocally place in issue the appropriateness of an IEP." Id. at 158. The Jameses did not unequivocally place their son's education at issue in 1994. The Third Circuit also held that the timing of the parents' communication is relevant, unlike the Sixth Circuit in James. In Bernardsville, the court held:

> We are cognizant of the fact that the school district serves a very large student population, and in light of the numerous contacts it has with parents seeking the individual welfare of their respective children, mere notice of parental "dissatisfaction" does not alone put the Board on reasonable notice that the parents will challenge a particular IEP in the future and seek reimbursement for an interim unilateral placement in a private institution. Absent initiation of review proceedings within

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the Jameses did not request a due process hearing at that point in time." (emphasis added) James, 228 F.3d at 768. (App. A at 5a-6a.) However, the Jameses' complaint does not allege that they asked for a new IEP. As the dissent noted, "Certainly plaintiffs were rebuffed and discouraged from returning their son to the district. At the same time, however, plaintiffs did not request an evaluation, seek a private placement or again request an IEP be prepared." Id. at 771. (App. A at 14a.) The majority erred as a matter of law by making an unwarranted factual inference from the allegations of the complaint. See Morgan v. Church's Fried Chicken, 829 F.2d 10, 12 (6th Cir. 1987).

> a reasonable time of a unilateral decision to transfer a child to a private institution, a school district would not know to continue to review and revise an IEP, and the court would be left to hazard conjecture or hypotheses as to what the Board of Education might have proposed if it had been informed of the parents' continued intent to pursue an appropriate education for their child within the school district.

Id. The Third Circuit recognized the importance of parents communicating to their public school district when they are unsatisfied with their child's education and identified the request for a due process proceeding as the clearest way to make this communication. In its decision in James, the Sixth Circuit held the opposite. The parents did not even provide notice of "dissatisfaction" let alone bring a due process request "within a reasonable time" of their unilateral decision. Instead, the parents waited to bring their due process request almost seven years after they unilaterally withdrew Joe and almost two years after they "discussed Joe's possible return" to the school district.

Similarly, the Second Circuit Court of Appeals in M.C.v. Voluntown Bd. of Educ., 226 F.3d 60 (2nd Cir. 2000) has held that parents must clearly communicate their dissatisfaction to the school district. In M.C., the parents requested reimbursement for the costs of psychological counseling eight months after their child's psychological treatment had ended. The court held that the parents were not entitled to any reimbursement for their costs since they had not placed the appropriateness of their child's IEP at issue. Id. at 69. The court held, "[C]ourts have held uniformly that reimbursement is barred where parents unilaterally arrange

for private educational services without ever notifying the school board of their dissatisfaction with their child's IEP." Id. at 68 (citations omitted). The Sixth Circuit has placed itself at odds with the Second Circuit. In 1994, Mr. and Mrs. James had not notified the school board of their dissatisfaction with a school district IEP - indeed, they had not even requested that the school district prepare an IEP. That should have been enough for the Sixth Circuit to dismiss their lawsuit. The Sixth Circuit overreached in its legal conclusion that the parents' vague conversation with the director of special education was enough to create a cause of action.

Likewise, the Eighth Circuit Court of Appeals has held that parents must give the public school district an opportunity to write an IEP for a child before unilaterally placing that child in a private school if they expect reimbursement. Schoenfeld v. Parkway Sch. Dist., 138 F.3d 379 (8th Cir. 1998). The Schoenfelds' son had attended the school district's middle school in seventh grade. In eighth grade, he went to the middle school the first day of school and then his parents unilaterally withdrew him and placed him in a private school. The child never returned to the middle school, and his parents did not contact the school district about paying for his education at the private school until over a year later. The Eighth Circuit denied any reimbursement to the parents. Id. at 382. The court reasoned that once the parents unilaterally withdrew their child there was no opportunity for the public school to modify the child's IEP or be involved in the placement decision. The court held that the parents' failure to seek an IEP before placing their child in a private school precluded reimbursement under the IDEA. Id. Under the Eighth Circuit's standards, the Jameses' suit would be dismissed since they did not bring their due process request before they withdrew their son and since they did not give the

school district an opportunity to prepare or revise an IEP in 1994.

The Ninth Circuit Court of Appeals has also held that parents have an obligation to communicate their dissatisfaction to a school district before they can expect to be reimbursed for private school tuition. Ash v. Lake Oswego Sch. Dist. No. 7J, 980 F.2d 585 (9th Cir. 1992). In Ash, the Ninth Circuit affirmed a district court decision denying parents the right to reimbursement from 1983 to September 1989. The district court had established September 1989 as the date the right to reimbursement accrued because that was the first date that the school district "had been asked to provide services to [the child] and had been given a reasonable opportunity to complete the process of evaluating Christopher and making a placement recommendation." Id. at 589, quoting Ash v. Lake Oswego Sch. Dist. No. 7J, 766 F.Supp. 852, 864 (D.Or. 1991). James is in direct conflict with Ash because the Sixth Circuit has allowed the parents' claims to proceed from 1994 on even though they did not ask that the school district provide services to Joe in 1994. All they did was discuss the possibility of his return. Under the Ninth Circuit standard, that communication would not be enough to create a cause of action.

Dicta from the First and Fourth Circuits is in concert with the views of the Second, Third, Eighth and Ninth Circuits. The Fourth Circuit weighed in on the importance of communication in an attorneys' fees action under the IDEA. In Combs v. Sch. Bd. of Rockingham Cty., 15 F.3d 357, 363-64 (4th Cir. 1994), the Fourth Circuit held that the student was not a prevailing party on a particular issue because he had not shown that the school district would not have taken certain actions absent his due process request. To the contrary, it appeared that the school district would have responded to the

student's concerns had it been aware of them. "School boards must be given adequate notice of problems if they are to remedy them, and must be given sufficient time to respond to those problems before they can be held liable for failure to act." Id. The First Circuit similarly has recognized the importance of communication in its statement that there is "a distinction between a unilateral parental transfer made after consultation with the school system, yet still an action without the system's agreement, and transfers made truly unilaterally, bereft of any attempt to achieve a negotiated compromise and agreement on a private placement." Town of Burlington v. Dept. of Educ., 736 F.2d 773, 779 (1st Cir. 1984), aff'd sub nom School Comm. of Burlington. v. Dept. of Educ. of Mass., 471 U.S. 359 (1985).

3. This Court's review is necessary to give lower courts guidance on what notice parents must give to school districts and when that notice must be given if parents want to preserve a right to seek tuition reimbursement.

This Court needs to provide the federal courts with a coherent framework for analyzing tuition reimbursement cases with respect to the obligations of parents to communicate with their public school systems. The federal courts have not developed a consistent standard that parents must meet, and indeed the Sixth Circuit is now seriously out of step with the other courts of appeals.

This Court has granted certiorari due to the importance of an issue to a particular industry. See, e.g., C.I.R. v. Lincoln Savings & Loan Assn., 430 U.S. 345, 346-347 (1971) (granting certiorari to decide question of importance to

savings and loan industry). Tuition reimbursement cases are of critical importance to public school systems across the country. Tuition reimbursement cases are high-stakes litigation for school districts. In 1997, Forbes magazine published anecdotal evidence of the high financial costs of tuition reimbursement requests and litigation. Gubemick and Conlin, *The Special Education Scandal,* Forbes, p. 66 (Feb. 10, 1997). The Green Brook School District in New Jersey was reportedly ordered to pay an annual tuition bill of $193,000 for a student's private residential school outside Boston, Massachusetts. Id. The Capistrano Unified School District in California was reported as having to pay $500,000 for three years of private school tuition and legal fees for both sides. Id. In Washington, D.C., more than a third of the district's entire special education budget is spent on private school placements, even though fewer than one-sixth of the district's special education students attend private schools. Worth, *The Scandal of Special Education,* Washington Monthly, Vol. 31, Iss. 6 (June 1, 1999). The special education budget itself comprises a third of the district's entire budget even though one-tenth of the district's students are in special education. Id.

Money spent on tuition reimbursement litigation is money not being spent on educating other students. Peter Hartman, superintendent of Saddleback Unified School District in California, has stated, "This is what gets stamped as justice, but it's robbing money from regular students." Forbes at p. 69. Other educators have opined that reimbursing parents for private school tuition is not a cost effective way of educating students. Many of the private school students could be adequately taught in public schools, and as a result, "public dollars are sometimes wasted, since it is more expensive to provide most specialized education services privately." Skaruppa, Boyer and Edwards, *Tuition*

Reimbursement for Parent's Unilateral Placement of Students in Private Institutions: Justified or Not?, 114 Ed. Law Rep. 353 (1997).

The costs associated with tuition reimbursement cases emphasize the importance of this area of law to public schools across the country. Parents should be obligated to communicate specifically with their home public school district about their concerns about their child's education and their expectation that the public school system pay for a private education for their child. This Court needs to review this case to provide guidance to the lower courts on what the nature and timing of that parental obligation should be.

Congress amended the IDEA in 1997 with one amendment addressing parental communication. That amendment, however, does not answer the important questions presented by the James case. The amendment provides that tuition reimbursement can be denied or reduced if (1) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP team that they were rejecting the school district's placement and that they were intending to enroll their child in a private school at public expense; or (2) 10 business days prior to the removal of the child from the public school, the parents did not give written notice to the public school as described in (1). 20 U.S.C. § 1412(a)(10)(C) (1997); see also 34 C.F.R. § 300.403(d) (1999). (App. D at 48a-50a, 58a-59a.)

The amendment gives no guidance to the issues presented in James. The amendment only applies prospectively and so does not address the plethora of pre-1997 cases currently pending in the courts about tuition reimbursement. See Fowler v. Unified Sch. Dist. No. 259,

128 F.3d 1431, 1435 (10th Cir. 1997); Heather S. v. Wisconsin, 125 F.3d 1045, 1062 (7th Cir. 1997); Cypress-Fairbanks Ind. Sch. Dist. v. Michael F., 118 F.3d 245, 247 n. 1 (5th Cir. 1997) (all holding that the IDEA amendments are prospective only). In addition, the amendment only deals with the limited situation in which parents decide up front that they want the public school to pay for the private placement and then only addresses the issue of the amount of relief. The amendment does not speak to the facts of the James case in which parents have had their child in a unilateral placement for a period of time and then approach the school district about their child's education. Moreover, the amendment does not tackle the question of what communication parents need to make and the timing of that communication in order to accrue a cause of action against a school district. Without any guidance from the amended IDEA on these questions, the courts will be left with their own standards on determining what nature and timing of communication will be sufficient. As identified above, the Sixth Circuit is in conflict with other courts of appeals regarding these standards.

The James case is the right case for the Court to review to determine the appropriate standards. First, the James case comes at a good time for review. The lower courts have had since 1993, when this Court decided Florence County, to develop their views on parental obligations. The courts have come up with varying standards with the Sixth Circuit severely out of sync with the other courts of appeals. Second, James is in a good procedural posture for review. The case comes to the Court on a motion for judgment on the pleadings with only one paragraph of the complaint at issue. As a result, there are not any complicated facts to bog down the Court. Instead, the alleged facts are simple and straightforward: the parents withdrew their son in 1989, they brought their due process request in 1996, and in 1994, they

"discussed Joe's possible return." Did the parents meet their obligation and preserve their right to seek tuition reimbursement from 1994 forward?

The Court should take this case on review to answer that question not just for Petitioners but to answer the broader question about parental obligations for the courts, school systems and parents across the country.

B. The Decision Below Regarding Educational Rights of Private School Children With Disabilities Also Merits Review.

1. This Court's review is necessary because the decision below is in conflict with other federal courts and the United States Department of Education.

The Sixth Circuit Court of Appeals not only blurred the lines on what triggers a school district's potential exposure for tuition reimbursement litigation but also blurred the lines on what triggers a school district's obligation to write an IEP for a student who has been placed in a private school by parental choice. The court held that when the parents "discussed Joe's possible return," the school district should have prepared an IEP for him. James, 228 F.3d at 768. (App. A at 6a-7a.) The dissenting opinion noted, "Despite having acknowledged that there is no clear law on the issue, the opinion nonetheless expressly holds, without analysis, that 'refusing to do an IEP pre-enrollment constitutes [ ] a violation [of the IDEA].'" Id. at 770 (citation and footnote omitted). (App. A at 13a.)

The Sixth Circuit is in conflict with the First Circuit Court of Appeals and the United States Department of Education. Both the First Circuit and the Department of Education would conclude that the school district had no obligation to offer an IEP to Joe while he was enrolled in and attending a private school. Accordingly, even if the school district had refused to prepare a pre-enrollment IEP in 1994, its actions would not have been in violation of the IDEA and would not have put it at risk of reimbursing the parents for their tuition costs.[4]

The Sixth Circuit's decision has the effect of requiring a school district to write IEPs for all special education children residing in the district regardless of where they go to school. The First Circuit held in Amann v. Stow Sch. Sys., 982 F.2d 644 (1st Cir. 1992), that the IDEA does not require such a result. In that case, the parents alleged that the school district had committed a procedural violation of the IDEA by failing to review and revise the child's IEP on an annual basis. The school district responded that it did not have to prepare an IEP for the child while the child was in a private placement chosen by the parents. The court agreed. It held that when parents unilaterally enroll their child at a private school, without challenging the child's IEP and without the school district's consent, then the school district is relieved of

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[4] As noted above in footnote 3, the Sixth Circuit also erred in its failed attempt to paraphrase the complaint. The parents never requested that a new IEP be written in 1994 and the district did not refuse to prepare one. As the dissent noted, "I would conclude that the plaintiffs' 1994 contact with the district did not constitute a cause of action as it did not involve the refusal to prepare a pre-enrollment IEP." (emphasis in original) James, 228 F.3d at 770. (App. A at 13a.)

the obligation to develop and implement an IEP for the child. Id. at 651. The court held, "The pendency of review, not the placement in private school, creates the need to maintain and update the IEP." Id. See also Carl D. v. Special Sch. Dist. of St. Louis, 21 F.Supp.2d 1042, 1057 (E.D. Mo. 1998) (holding that "a school district is not required to develop and implement, on an annual basis, an IEP for a disabled student once he has been unilaterally placed in a private school by the parents").

The First Circuit's decision is supported by the provisions of the IDEA. School districts are not required to provide services, including development of IEPs, for children who are privately placed by their parents. See Letter to Graham, 22 IDELR 502 (OSEP Oct. 5, 1994) ("Under Part B, parentally-placed children with disabilities do not have an individual entitlement to services. Therefore, school districts are not required to provide those children with all of the services under Part B to which they would be entitled if served in a public placement, nor are school districts required to serve each and every parentally-placed child with a disability.") (emphasis added).[5]

Current regulations identify "enrollment" as a key factor to service: "No private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if

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[5] The amended IDEA and its regulations are equally specific in providing that privately placed children do not have the right to receive special education services. See 20 U.S.C. § 1412(a)(10)(A) (1997); 34 C.F.R. § 300.454(a)(1) (1999). (App. D at 47a-48a, 59a-60a.)

enrolled in a public school." 34 C.F.R. § 300.454(a)(1) (1999) (emphasis added). (App. D at 59a-60a.) In its comments to the final regulations promulgated in 1999, the United States Department of Education identified enrollment as the triggering event. In discussing a public school district's obligation to children with disabilities placed in private schools by their parents, the Department of Education stated:

> It would not be necessary for a public agency to develop an IEP that assumes a public agency placement for each private school child each year.
>
> ***
>
> In addition, since [public schools] must make [a free appropriate public education] available to all children with disabilities in their jurisdiction (§§ 300.121, 300.300), public agencies must be prepared to develop an IEP and to provide [a free appropriate public education] to a private school child if the child's parents re-enroll the child in public school.

64 Fed. Reg. 12,601 (1999) (emphasis added).

Similarly, the regulations in effect prior to the 1997 IDEA amendments recognized that enrollment is the trigger to providing services to disabled children. The Department of Education advised that if a child with a disability who has been receiving special education in one school district moves to another district, the new school district should hold an IEP meeting "within a short time after the child enrolls" and prior to being placed in a special education program. See 34

C.F.R. Part 300, App. C, Question 6 (1993) (emphasis added); see also 34 C.F.R. Part 300, App. A, Question 17 (1999). (App. D at 46a-47a, 60a-61a.) Therefore, the school district did not have any obligation to write an IEP for Joe until he was enrolled in the school district.

The Sixth Circuit erred in its presumption that reenrollment would mean that Joe James would have to spend one day or even an entire school year in an inadequate program. James, 228 F.3d at 768. (App. A at 7a.) Enrollment does not equal attendance and does not require that a child be physically in a school building within the school district.[6] Entering the child's name on the school district's records as a student for which it is responsible is not inconsistent with the school district and the parents then agreeing to place the child in a school or program outside the physical facilities of that district. As Congress recognized in 20 U.S.C. § 1413(a)(4)(B), children might be placed in private schools at no cost to their parents or guardians, if the state and local educational agency determine that is the only way to meet their obligation to provide a free appropriate public education.[7] (App. D at 38a.) Enrollment is a clear communication parents must make to a school district that

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[6] The verb "enroll" means "to enter the name of on a roll, register or record; to place one's name on a roll, register, or record." Webster's II New Riverside Dictionary 230 (1996). Similarly, Black's Law Dictionary defines "enroll" as "to register, to record," and enrollment as the "act of recording, enrolling, or registering." Black's Law Dictionary, 366 (6th Ed. 1991).

[7] The amendments to the IDEA did not make significant changes to this provision. 20 U.S.C. § 1412(a)(10)(B) (1997); 34 C.F.R. § 300.401 (1999). (App. D at 48a, 58a.)

they believe the school district is now responsible for their child's education. The Jameses did not meet that obligation.

Since the act of enrollment is so simple - completing a form and submitting it to a clerk - it is impossible to characterize Dr. Meadows' alleged comments as precluding Joe's enrollment. The parents do not allege that they requested or took any steps to perform the simple act of enrollment. The bald allegation that Dr. Meadows said "[d]on't bring him back now, give me a couple of years to get someone trained" does not equate to refusal to enroll or serve the child. There is no allegation that Dr. Meadows refused to provide appropriate yet different services within the district or similar services somewhere else at school district expense. Those are the very issues that would have been addressed in an IEP meeting had the parents requested one.

Similar to its missteps on tuition reimbursement, the Sixth Circuit is out of step with other federal courts, and even the Department of Education, with respect to the obligation it imposes on public school districts to prepare IEPs for privately placed children. This Court should reconcile that conflict.

2. This Court's review is necessary to give direction to public school boards and their administrators about their obligations to privately placed disabled children.

This Court has granted certiorari when a court of appeals' interpretation of a federal act raised issues of importance in administering that act. See, e.g., United States v. Article of Drug, Bacto-Unidisk, 394 U.S. 784, 791 (1979) (granting certiorari to reverse court of appeals' interpretation

of definition of "drug" under federal Food, Drug & Cosmetic Act). When to develop an IEP for a student is of fundamental importance to the application of the IDEA. This Court needs to review this case to provide guidance to public schools about when they need to prepare IEPs for students whose parents have placed them in private schools.

Enrollment should be the triggering event for the development of an IEP. The Sixth Circuit has rejected that bright-line standard - now, even a casual conversation at a grocery store between parents and a school district employee will trigger both the duty to prepare an IEP for the child and potentially the parents' right to tuition reimbursement.

If the Sixth Circuit's opinion is allowed to stand, any time a parent even discusses the possibility of returning their child from a private placement, a school district will have to prepare an IEP for the child even though the parents have never asked for one and may have no real intention of returning their child to the public school. Once the district writes the IEP, the parents will have no obligation to share any concerns they may have with the school district and give it an opportunity to respond. Instead, the parents will have satisfied the procedural prerequisites for a tuition reimbursement claim merely by mentioning the possibility of returning the child to the school district. The Third Circuit in Bernardsville recognized that this is unrealistic:

> We are cognizant of the fact that the school district serves a very large student population, and in light of the numerous contacts it has with parents seeking the individual welfare of their respective children, mere notice of parental "dissatisfaction" does not alone put the Board on reasonable notice that the parents

> will challenge a particular IEP in the future and seek reimbursement for an interim unilateral placement in a private institution.

Bernardsville, 42 F.3d at 158.

The Sixth Circuit has placed a burdensome and totally unnecessary responsibility on public school districts within its jurisdiction. To protect themselves from possible litigation, school districts will have to develop IEPs for all students attending private schools. This will result in significant wasted time for special education teachers, regular education teachers, school psychologists and school administrators who must be a part of the IEP team.[8] Already these individuals are making a serious commitment to the disabled students enrolled in their school districts by preparing IEPs for them in accordance with the IDEA and reviewing and revising those IEPs on an annual basis. 20 U.S.C. §§ 1401(a)(19), (a)(20); 1414(a)(5); 34 C.F.R. §§ 300.342; 300.346.[9] (App. D at 36a-37a, 39a, 45a-46a.) This burden should not be underestimated. The Department of Education determined that 5.9 million disabled students were enrolled in special

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[8] The amended IDEA requires that all of these people, and possibly more, be involved in the development of an IEP. 20 U.S.C. § 1414(d)(1)(B) (1997); 34 C.F.R. § 300.344(a) (1999). (App. D at 53a-55a.)

[9] The amendments to the IDEA did not make significant changes to the contents of an IEP and the annual obligation to prepare an IEP. 20 U.S.C. § 1414 (d)(1)(A), (d)(4)(A) (1997); 34 C.F.R. §§ 300.346(b); 300.347(a) (1999). (App. D at 50a-54a, 55a-58a.)

education programs across the country in the 1997-98 school year. U.S. Department of Education, National Center for Education Statistics, *Digest of Education Statistics,* 1999, Table 53, page 66. That equates to 13 percent of public school children. Id. The IDEA requires that IEPs be written for each one of those children. The Sixth Circuit would only want to increase that number by having public schools also prepare IEPs for private school children. This Court must review James so that schools are relieved of this onerous and useless task.

The Court should also review the case so that the burdens placed on parents and public school districts can be balanced. The IDEA places certain duties on public schools and parents alike regarding the education of disabled children. Public school districts are required to provide a free appropriate public education, and parents must avail themselves of certain procedures in order to challenge or change the conditions surrounding the education of their children. The IDEA and the lower courts, except the Sixth Circuit, have established a two-tiered framework within this larger scheme that imposes mutual obligations before school districts will be liable to reimburse parents for unilateral private placements. First, the parent must enroll his or her child in the public school district, which triggers the district's obligation to serve the child and draft an IEP. Second, if the parent is dissatisfied with the IEP, the parent must then complain to the district and provide it an opportunity to remedy the defects, which triggers the district's potential obligation for reimbursement for a private placement. This framework provides opportunities for parents and school districts to cooperate to provide a free appropriate public education to children with disabilities, which is the ultimate goal of the IDEA.

The Sixth Circuit Court of Appeals' decision eliminates the duties of parents to enrol' the child and to complain about the IEP. By eliminating these duties, the Sixth Circuit abrogates the parents' duty of cooperation and eliminates the possibility for the school district to remedy the problems and provide a free appropriate public education for the child. If the Sixth Circuit's decision is permitted to stand as authoritative law, parents in Michigan, Ohio, Kentucky and Tennessee will be able to place their children in private schools unilaterally and school districts will be liable for reimbursement from the moment a parent merely mentions that the child may return to the school, with no further obligation from the parent and no further opportunity for the school district to provide a free appropriate public education. On the other hand, parents in many other states will have the continued obligation to communicate with their public school system before that school system will be at risk for reimbursement. And still in other states, the conflict between the courts of appeals will result in uncertainty and ambiguity about the obligations parents have and thus result in protracted litigation. A review of this case will give the Court an opportunity to speak to parents and school districts in all the states about the requirements the IDEA places on them to communicate with each other.

V. CONCLUSION

Petitioners respectfully request that the Court grant the Petition for Writ of Certiorari to reconcile the conflicting decisions of the United States courts of appeals. Moreover, the petition should be granted so the Court can provide direction to schools across the country about when their obligation to provide services to disabled children begins and to provide direction to parents about their obligation to communicate their expectations about their children's

education to schools if they expect to be reimbursed for their private school costs. Such direction will benefit the lower courts, schools and parents as they all continue to grapple with costly tuition reimbursement litigation.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed September 28, 2000]

No. 98-3048

JOSEPH JAMES, a minor by and through his parents, Nancy James and Cameron James; NANCY JAMES; CAMERON JAMES,
Plaintiffs-Appellants,

v.

UPPER ARLINGTON CITY SCHOOL DISTRICT, et al.,
Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Ohio at Columbus.
No. 97-00172–Edmund A. Sargus, Jr., District Judge.

Argued: April 27, 2000

Decided and Filed: September 28, 2000

Before: GUY, BOGGS, and SUHRHEINRICH, Circuit Judges.

OPINION

BOGGS, Circuit Judge. Nancy and Cameron James removed their son Joseph from the Upper Arlington school system in November 1989, because he was in the fourth grade and still could not read due to severe dyslexia, which the parents felt that the school was not doing enough to help him overcome. At a meeting the previous month to discuss Joseph's individualized educational program (IEP), the school district had told the parents that Joe would never learn to read and would "have to learn there are other ways to get information besides reading." Over the next six years, Joseph was placed in three different private schools, where he did learn to read. The Jameses did not ask the school district to pay for the tuition. They did, however, continue to have some interaction with the district.

In the spring of 1990, the Jameses asked for a new IEP for Joseph, but were told that the school district would not prepare one until Joseph re-enrolled in the public school system. They declined to pursue that option. According to the complaint, "after Joe completed the [school] year at Kildonan," the Jameses again approached the school district about returning Joseph to the public schools, but the Director of Special Education told the parents, "Don't bring him back now, give me a couple of years to get someone trained." The Jameses did not challenge that advice, or the district's continuing refusal to write an IEP for Joseph until he re-enrolled. Finally, on May 13, 1996, the Jameses made a written request for a due process hearing under the

Individuals with Disabilities Education Act (IDEA), seeking retroactive and prospective tuition from Upper Arlington for Joseph's private school education.

The Administrative Officer never reached the merits of whether Joseph had an appropriate individual education plan, nor was there an evidentiary hearing, because the AO accepted the school district's argument that the Jameses had not followed proper procedures, and therefore granted the district's motion to dismiss. A state level review officer affirmed the AO's decision, based on the grounds that the parents had unilaterally withdrawn their son without first pursuing the appropriate administrative remedies.

The district court granted judgment on the pleadings to the school district in a December 15, 1997 order, holding that the statute of limitations had begun to run in November 1989 when Joseph was removed from the school district and had expired no more than four years later, long before the current action began. The district court noted that the Jameses had known of their right to initiate a due process hearing in 1989, but had failed to do so until 1996. Because they failed to pursue administrative relief before removing their son from public school, and because the statute of limitations has run, the district court concluded that the Jameses are no longer entitled to an education at public expense. We disagree with the district court that the Jameses did not give the school district an adequate opportunity to correct Joseph's educational program. Although we affirm the judgment of the district court with regard to Joseph's 1989 removal and the 1990 rebuffed request for an IEP on statute of limitations grounds, we remand the case for further proceedings on the

separate subsequent cause of action that arose in 1994 and may have been timely pursued in 1996.

I

The Supreme Court has held that parents who violate the "stay-put provision" of IDEA (20 U.S.C. § 1415(e)(3), now 20 U.S.C. § 1415(j)) during the pendency of administrative review procedures do not forfeit the right to tuition reimbursement. *See School Comm. of Burlington, Mass. v. Department of Educ. of Mass.*, 471 U.S. 359 (1985). However, if their removal decision is not upheld, they do not get reimbursed. *See Florence County Sch. Dist. Four v. Carter,* 510 U.S. 7, 15 (1993) ("[P]arents who . . . unilaterally change their child's placement during the pendency of review proceedings . . . do so at their own financial risk"). The Sixth Circuit has read this precedent to mean that parents who ignore the administrative process entirely "generally render their children ineligible for free special education." *Wise v. Ohio Dept. of Educ.*, 80 F.3d 177, 183 (6th Cir. 1996). The *Wise* plaintiffs never made a formal request for a hearing, so the facts are slightly different than here where a request was made eventually, although extremely late in the game.

The law is well established that parents who unilaterally withdraw a student, request a due process hearing, and pursue administrative relief, may recover tuition retroactively if their administrative action is successful. Less clear is whether parents who do not request a hearing until years later receive similar treatment. The Jameses' claim thus raises two questions. First, may their 1994 interaction with the school district be construed to raise a new cause of action?

Second, if not, then does the statute of limitations bar consideration of the merits of the Jameses' claim?

II

The Jameses acknowledge that they did not request a due process hearing until 1996. However, they claim that the school district did not advise them that they could request such a hearing or that they might have a right to tuition reimbursement. Moreover, they note that the IDEA requires school districts to give parents such notice in writing when the school district refuses to make a requested change in a child's special education program. The district concedes such an obligation under the statute, but insists that the Jameses acted unilaterally, and that the school district thus never had an opportunity to refuse to make a requested change. In addition, the record contains evidence suggesting that the Jameses had actual notice of their hearing rights. On April 14, 1987, Mrs. James signed a form stating that "My rights have been discussed with me and I have received . . . information for parents regarding special education." This information included a brochure informing parents that "you . . . have the right to request an impartial due process hearing at any time to resolve disagreements related to . . . the provision of a free appropriate public education to your child." Despite knowledge of their hearing rights, the Jameses did not seek a hearing to resolve the problem with the school district's education program for their son until 1996.

The Jameses' 1994 interaction with the school district suggests that a new cause of action arose prior to their 1996 request for a due process hearing. Taking all the well-pleaded facts as true, as we must on a motion to dismiss, the Jameses

made contact with the school system about returning their son in 1994 and having a new IEP done, but were essentially rebuffed. Although Joseph was never enrolled, and the school district never refused to enroll him or to do a *post*-enrollment IEP, the district did discourage the Jameses from re-enrolling Joseph. Furthermore, the district told the Jameses that their child would have to be re-enrolled before the school district would be obligated to do a new IEP for him.

There is no clear law that this is correct. The obligation to deal with a child in need of services, and to prepare an IEP, derives from residence in the district, not from enrollment. The district can perhaps be excused for taking no action during 1989-94, when apparently the child was being educated to his parents' satisfaction without input from the school district. Since the Jameses were aware, at least constructively, of the availability of a due process hearing, the school's failure to update their notice during that interval did not create a new cause of action. The IDEA establishes the appropriate course of action for parents who are dissatisfied with a public school's intended educational program for their child. By not following those procedures, parents cannot create a new cause of action not envisioned by the Act itself. In short, the Jameses had an obligation to request a due process hearing, and they failed to meet that obligation in a timely fashion. *See Ash v. Lake Oswego Sch. Dist. No. 7J*, 766 F. Supp. 852, 864 (D. Or. 1991).

The excusable state of affairs apparently came to an end in 1994 when the parents specifically approached the school district about re-enrollment and obtaining a new IEP, even though the Jameses did not request a due process hearing at that point in time. If the Jameses' rights were in any way

violated at that point, a cause of action arose at that time separate from any that arose in 1989. We hold that refusing to do an IEP pre-enrollment constitutes such a violation. *See Cleveland Heights-Univ. Heights City Sch. Dist. v. Boss,* 144 F.3d 391, 393 (6th Cir. 1998) (noting in passing that federal law required development of an IEP for a child still enrolled in a private school). To hold otherwise would allow the school to slough off any response to its duty until the parents either performed the futile act of enrolling their son for one day and then withdrawing him as soon as the IEP was complete, or, worse, leaving the child in an arguably inadequate program for a year just to re-establish his legal rights. Neither action seems to be compelled by the statutory scheme or the case law. Nor does the failure to request a due process hearing in 1994 vitiate the cause of action that accrued in 1994. Rather, the request for a hearing made in 1996 preserved the earlier claim as well as the claim relating to the 1996-97 school year.

III

This court has never squarely decided whether the statute of limitations bars consideration of the merits of a claim like the Jameses'. Still, as in *Wise*, the Jameses did not give the school an opportunity to remedy the problem before 1994. Assuming for purposes of argument that the school district's plan for Joseph was inadequate, by unilaterally withdrawing their son and failing to seek administrative relief in a timely fashion, the Jameses prevented the school from correcting that inadequate plan. The IDEA does not require the best possible education at public expense, only an appropriate one. *See Wise,* 80 F.3d at 185. Given the opportunity, the Upper Arlington school district may have

been able to provide Joseph an appropriate education, albeit not the best one possible.

The Jameses' initial cause of action arose in November 1989 when they decided that the school district was failing their son. The IDEA, like § 1983, does not specify a statute of limitations. In such cases, federal courts adopt the statute of limitations from state law that most closely corresponds to the action brought. *See Janzen v. Knox County Bd. of Educ.*, 790 F.2d 484 (6th Cir. 1986). The *Janzen* court held that no one state statute of limitations applies, so it must be judged on a case-by-case basis. Here, however, whether applying Ohio's two-year statute of limitations for personal torts or its four-year statute of limitations for actions to recover personal property, the statutory limit has run for a suit to recover tuition starting in 1989. Their initial claim accrued when they knew of the injury to their child [i.e., the inadequate education]. *See Hall v. Knox County Bd. of Educ.*, 941 F.2d 402, 408 (6th Cir. 1991). However, the Jameses' 1996 request for a due process hearing was clearly less than four years, and may have been less than two years, after the cause of action that accrued in 1994 and thus may be heard.

By unilaterally withdrawing their student from public school and requesting a due process hearing, parents assume a double risk. First, they assume the risk that their child's IEP will be found adequate, thus precluding their reimbursement. Second, they assume the risk that though their child's IEP was inadequate, the alternative placement they chose for their child will not be deemed an adequate education either, thus precluding their reimbursement. As noted above, the Supreme Court has determined that parents are entitled to assume such a risk and proceed in such a manner. Parents are not entitled,

however, to delay a request for a due process hearing, incur tuition costs of their own choosing for several years (thus depriving the school district of a chance to fashion a less expensive acceptable alternative), and then ask the school district to fund whatever alternative they have pursued in the interim.

The Jameses argue that *Doe v. Metropolitan Nashville Pub. Sch.* changes the outcome of this case. *See Doe,* 133 F.3d 384 (6th Cir. 1998). However *Doe* is readily distinguishable from the case at bar. The school district in *Doe* had failed to comply with the IDEA's so-called child-find requirements. The parents had also made the private placement without having had prior contact with the school system. Perhaps most significantly, the *Doe* court concluded that genuine issues of material fact existed in that case, and that the district court had improperly weighed evidence at the summary judgment stage. No genuine issues of material fact exist in the case under review, and thus the district court did not improperly weigh anything relating to the 1989 cause of action that must be remanded for trial.

IV

The Jameses' Rehabilitation Act and § 1983 claims based on the 1989 cause of action are likewise barred by their respective two-year statutes of limitations. *See Southerland v. Hardaway Mgmt., Inc.,* 41 F.3d 250, 254 (6th Cir. 1994) (rehabilitation act); *Wilson v. Garcia,* 471 U.S. 261, 266-67 (1985) (Section 1983). In addition, the Jameses' claims against school officials are not proper under the IDEA absent a claim that they failed to act in fulfillment of their statutory duties. *See Reid v. Board of Educ. Lincolnshire-Prairie View,*

765 F. Supp. 965, 969 (N.D. Ill. 1991) (citations omitted). Finally, there does not appear to be any good reason to toll the statute of limitations in this case. The Jameses were aware of their rights and sat on them, which does not justify tolling.

V

The Jameses had an obligation under the IDEA to challenge the Upper Arlington school district's IEP through administrative channels. Even after unilaterally withdrawing their son, they could have requested a due process hearing on the adequacy of the IEP. Instead, they waited for almost seven years to seek reimbursement for private tuition costs they had incurred. Still, they did approach the school district in 1994 and were denied an IEP. That latter circumstance gives them a cause of action, even though their earlier action does not. Under the circumstances presented to the court, we hold that the plaintiffs cannot recover their expenses retroactively between 1989-94, but can pursue a claim regarding tuition after the Jameses approached the school district in 1994 and were rebuffed.

For the above reasons we AFFIRM the judgment of the district court in part, REVERSE it in part, and remand the case to the district court for further proceedings consistent with this opinion.

CONCURRING IN PART, DISSENTING IN PART

RALPH B. GUY, JR., Circuit Judge, concurring in part and dissenting in part. I concur in the court's judgment to the extent that it affirms the dismissal of the plaintiffs' claims, but dissent from the conclusion that the plaintiffs'

contact with the school district in 1994 gave rise to a new cause of action under the IDEA. I would affirm the judgment of the district court and briefly write to explain my view of the matter.

The remedies available under 20 U.S.C. § 1415(e)(2)[1] may include reimbursement to parents for private school tuition and expenses. *See School Comm. v. Department of Educ.*, 471 U.S. 359, 371 (1985). Disputes about who will be financially responsible for private schooling paid for by the parents is a matter subject to the due process procedures. *See id.* (citing 34 C.F.R. § 300.403(b)). We have held that parents who are dissatisfied with the publicly funded education being provided to their child must complain and, if necessary, seek a due process hearing before unilaterally withdrawing their child from a public school. *See Wise v. Ohio Dept. of Educ.*, 80 F.3d 177, 184 (6th Cir. 1996). I agree that the plaintiffs' failure to request a due process hearing until six and a half years after withdrawing their child from the district cannot be excused on the grounds that the district failed to provide them adequate notice of their rights.

Although the opinion does not say so, some readers may interpret it to hold that unilateral withdrawal is a complete bar to claims for reimbursement unless a new cause of action arises. I would clarify that unilateral withdrawal is separate from the statute of limitations issue. While this

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[1] Although significant amendments to the IDEA were enacted in 1997, the parties agreed that the amended provisions do not apply in this case. *See* Pub. L. No. 105-17, Title II, § 201(a)(2)(C) (June 4, 1997). The statutory sections cited in this case, therefore, are the pre-amendment provisions.

distinction is immaterial here because a due process hearing was not requested within the statute of limitations, this court has not yet decided if, or when, a unilateral withdrawal bars a claim for reimbursement after a request for review has been made.[2] Notably, the Court in *Burlington* rejected the contention that a parental violation of the stay-put provision constitutes a waiver of reimbursement. *See* 471 U.S. at 372.

The appropriate statute of limitations for claims under the IDEA must be determined on a case-by-case basis. *See Janzen v. Knox County Bd. of Educ.*, 790 F.2d 484, 486-87 (6th Cir. 1986). Claims under the IDEA generally accrue when the parents know, or have reason to know, of the injury or event that was the basis of their claim. *See Hall v. Knott County Bd. of Educ.*, 941 F.2d 402 (6th Cir. 1991). I agree that plaintiffs' IDEA claims accrued in 1989 when they unilaterally withdrew their child from the school district. At that time, plaintiffs knew the school was not providing the services they felt their son needed and alleged that he was suffering terribly as a result. As such, plaintiffs' claims were barred under either the two-year limitations period for personal injury actions, or the four-year limitations period for actions seeking recovery of personal property. *See* OHIO REV. CODE § § 2305.09-.10.

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[2] In fact, the Third Circuit has held that "when parents unilaterally withdraw their children from public school, absent mitigating circumstances, they are not entitled to reimbursement for private school tuition until they request review proceedings." *Warren G. v. Cumberland County Sch. Dist.*, 190 F.3d 80, 84 (3d Cir. 1999) (citing *Bernardsville Bd. of Educ. v. J.H.*, 42 F.3d 149, 156-58 & n.14 (3d Cir. 1994)).

I dissent from the majority's finding that a new cause of action arose in 1994, which was within either limitations period, when the plaintiffs' inquiries about returning to the district were rebuffed for a second time. Despite having acknowledged that there is no clear law on the issue, the opinion nonetheless expressly holds, without analysis, that "refusing to do an IEP pre-enrollment constitutes [] a violation [of the IDEA]." (Para. 14).[3] Without resolving this question, particularly given the dearth of authority provided on the issue, I would conclude that the plaintiffs' 1994 contact with the district did not constitute a new cause of action as it did not involve the *refusal* to prepare a pre-enrollment IEP.

Factually, plaintiffs' claims concerning the 1990 and 1994 contacts with the school must be distinguished. In March 1990, the district agreed to re-evaluate plaintiffs' son and to meet with them to discuss the results. The district, however, would not review or prepare an IEP unless he was re-enrolled in the district. When plaintiffs expressed an intention to re-enroll him, the district agreed to participate in an IEP meeting with the private school. The district nonetheless continued to refuse to review the IEP and recommend changes until he was re-enrolled. Plaintiffs kept their son in the private school. Without deciding whether a new cause of action was triggered by these events, I would find that such a claim would have accrued in 1990 and would be outside either statute of limitations period.

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[3] The only case cited in support of this holding did not involve this issue, but noted in its recitation of the facts that the school district realized it had an obligation to prepare an IEP before the child re-enrolled. *See Cleveland Heights-Univ. Heights Sch. Dist. v. Boss*, 144 F.3d 391, 394 (6th Cir. 1998).

With respect to the 1994 contact, however, plaintiffs allege that they met with the district's director of special education after the end of the school year to discuss their child's possible return to the district. They were told not to bring him back then, but to give her "a couple of years to get someone trained." Certainly, plaintiffs were rebuffed and discouraged from returning their son to the district. At the same time, however, plaintiffs did not request an evaluation, seek a private placement, or again request that an IEP be prepared. Even if a refusal to prepare a pre-enrollment IEP could constitute a violation of the IDEA, plaintiffs' 1994 contact falls short. I would find that no new cause of action accrued in 1994 and, accordingly, that all of plaintiffs' IDEA claims were barred by the statute of limitations.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed December 15, 1997]

Case No. C2-97-172

JOSEPH JAMES, et al.,
Plaintiffs,

vs.

UPPER ARLINGTON CITY
SCHOOL DISTRICT, et al.,
Defendants.

Judge Sargus
Magistrate Judge King

I.

This matter is before the Court on a Motion for Judgment on the Pleadings filed by Defendants, Upper Arlington City School District, et al.,[1] pursuant to Fed. R. Civ. P. 12(c). Plaintiff, Joseph James, and his parents, oppose the motion, arguing that the facts alleged in the pleadings are in dispute, and, thus, summary disposition of the matter under Rule 12 (c) is not appropriate. For the reasons that follow, however, Defendant's Motion for Judgment on the Pleadings is granted.

II.

The following facts have been elicited from the parties extensive pleadings,[2] and are viewed in a light most favorable

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[1] Plaintiffs named as Defendants Upper Arlington City School District; Upper Arlington City Board of Education, and, in their official representative capacity, William Schaeffer, Superintendent; Linda Ready, School Board President; Edward Seidel, Mark Sheriff, Thomas C. Wilson, III, and Steve Sikora, School Board Members.

[2] Plaintiffs submitted a twenty-seven (27) page Complaint. A large number of exhibits are appended to Plaintiffs' Complaint. These documents are a part of the Complaint for all purposes, including the purpose of determining what the complaint alleges. Fed. Civ. P. 10(c); see also Beam v. IPCO Corp., 838 F.2d 242, 244 (7th Cir. 1988). The Court does not view any of the appended exhibits as "matters outside the pleading" for purposes of determining issues of fact; rather, the Court examines the exhibits solely for the purpose of determining the legal sufficiency of Plaintiffs' claims, which are based on the facts and allegations

to Plaintiffs, as nonmovants. All reasonable inferences have been drawn in favor of Plaintiffs.

Plaintiff, Joseph James, has a severe form of dyslexia. Dyslexia is a neurological disorder which affects an individual's ability to acquire basic language skills, including reading and writing. Joseph's physician, Dr. Sandra M. Stewart, made a preliminary diagnosis of dyslexia in July, 1985, just two months before the child entered Kindergarten at the Barrington Elementary School in the Upper Arlington School District.

Joseph's parents, Plaintiffs Nancy and Cameron James, provided the school with Dr. Stewart's report and discussed Joseph's learning disability with his classroom teacher as well as the building principal. Joseph's Kindergarten year was uneventful in terms of the relevant issues before this Court.

Before Joseph began his first grade year in 1986, the Barrington School informed the James that Joseph qualified for the Reading Recovery program.[3] Mr. and Mrs. James

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documented in the exhibits. Thus, the Court does not convert Defendants' Motion for Judgment on the Pleadings into a motion for summary judgment pursuant to Fed. R. Civ. P. 12(c). The Court therefore considers the exhibits attached to the Complaint as part of the pleadings.

[3] Plaintiffs contend that the Reading Recovery program was experimental, and used indiscriminately without proof that it assisted dyslexic children. Moreover, Plaintiffs contend that the Barrington School benefited financially from sponsoring and

consented to Joseph's participation in the program. The Reading Recovery program did not prove beneficial to Joseph, and the child did not progress in his reading skills. Following this unsuccessful year of Reading Recovery, Joseph was identified as a special education student, an evaluation was conducted, and an individualized education program ("IEP") was developed in June of 1987.

Barrington continued to use Reading Recovery as the primary means to teach Joseph to read. During his first, second, and third grade years, Joseph regressed in reading, writing and arithmetic. Joseph's parents became increasingly dissatisfied with the School District's approach to Joseph's learning disability. In October of 1989, during Joseph's fourth grade year, the Barrington School scheduled another IEP meeting. During this October 1989 IEP meeting, Plaintiffs "realized that Upper Arlington School District was either unable or unwilling to modify their existing program to meet Joe's unique needs and could not provide Joe with the services he required in order to learn how to read." (Complaint, ¶ 86.)

In November of 1989, Joseph's parents unilaterally withdrew him from Barrington Elementary School and placed him into Marburn Academy, a private special education school. Under a special program known as the Orton-Gillinham approach, Joseph experienced initial success during his fourth (1989-1990), fifth (1990-1991) and sixth grade years (1991-1992) at Marburn. Joseph then attended the Gow School in 1992-1993, which proved to be much less

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implementing the Program.

constructive. The parents then enrolled Joseph in the Kildonan School, in Amednia [sic], New York, at the beginning of his eighth grade year (1995-1996), where he has remained a student, and is doing well.

Upper Arlington School District created Form EVF 215, a brochure entitled Information for Parents Regarding Special Education, in July 1982. (Complaint, Exhibit S, "Final Decision of Impartial Hearing Officer," Findings of Fact, at ¶ 6.) Section VI of Form EVF 215, entitled "Mediation, Impartial Due Process Hearing, and Appeals," provides in pertinent part:

> An impartial due process hearing is a formal, administrative procedure that is held to resolve disagreements. Both you, and the school district have the right to request an impartial due process hearing at any time to resolve disagreements related to any school district proposal . . . or the provision of a free appropriate public education to your child. . . .

On April 14, 1987, Nancy James signed a form entitled Parent Response for Evaluation, which states "My rights have been discussed with me and I have received (1) Request for Evaluation Letter, (2) Proposed Evaluation Form and (3) Information for Parents Regarding Special Education. (Complaint, Exhibit S, "Final Decision of Impartial Hearing Officer," Findings of Fact, at ¶ 7.)

Plaintiffs did not request a due process hearing until May 13, 1996, a full six and one-half (6 ½) years after his parents had removed Joseph from the Upper Arlington School

District in November of 1989. In their 1996 request for a due process hearing, Plaintiffs put the School District on notice that they desired retrospective and prospective reimbursement for Joseph's tuition during the 1993-94, 1994-95, 1995-96, and 1996-97 academic years pursuant to Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et. seq.. At the administrative level, the School District filed a motion to dismiss/or for summary judgment. The Administrative Hearing Officer granted the School District's motion on the grounds that the parents unilaterally withdrew their son from the Barrington School without exhausting or initiating due process procedures. This decision was affirmed administratively.

Plaintiffs filed their complaint against the Upper Arlington School District and the Board of Education, along with its superintendent and board members, primarily as an appeal of the administrative decisions. In this appeal, Plaintiffs also seek redress for alleged violations of § 504 of the Rehabilitation Act, 29 U.S.C. § 794, and for purported due process violations in contravention of 42 U.S.C. § 1983. Defendants filed their answer, and subsequently moved for judgment on the pleadings.

III.

Defendants bring the instant motion under Fed. R. Civ. P. 12(c) which provides that, "after the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Judgment may be granted under Rule 12(c) where the movants clearly established that no material issue of fact remains to be resolved and that they are entitled to judgment as a matter of

law. Beal v. Missouri Pacific R.R., 312 U.S. 45 (1941); 5 C. Wright & A. Miller, Federal Practice and Procedure (hereinafter Wright & Miller) § 1368, p. 518. For purposes of this motion, all well-pleaded material allegations of the pleadings of the opposing party must be taken as true, while all contravening assertions in the movants' pleadings are taken as false. Given this standard, the motion may be granted only if the moving party is nevertheless clearly entitled to judgment. Southern Ohio Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 479 F.2d 478 (6th Cir. 1973); 5 Wright & Miller, § 1368, p. 520.

The rule itself provides for a conversion procedure whereby the motion for judgment on the pleadings may be deemed a rule 56 summary judgment motion where matters outside the pleadings are presented to and not excluded by the court; however, it is within the court's discretion whether to accept extraneous matter on a 12(c) motion and treat it as one for summary judgment. See, e.g., A.S. Abell Company v. Baltimore Typographical Union No. 12, 338 F.2d 190 (4th Cir. 1964); 5 Wright & Miller, Ś 1371, p. 705. In the instant situation, the Court declines to consider matters outside the pleadings, given the conclusion that the issue is one of law which can be resolved on the pleadings, and consequently, the standards governing Rule 12(c) are applicable.

IV.

A. Individuals with Disabilities Education Act

This dispute involves Plaintiffs' request for reimbursement for the substantial funds they have spent in private school tuition after Joseph was removed from the

Barrington School in the Upper Arlington School District in November of 1989. Plaintiffs aver that they have invested over $150,000 for Joseph's education in private schools.[4] (Complaint, Exhibit B, Due Process Request, p. 9.) Plaintiffs contend that they never were advised by the School District that their child had a right to a continuum of special education placements, including private school special education placement. As such, Plaintiffs contend that they are entitled to reimbursement, even though they failed to initiate the administrative due process proceedings until 6 ½ years after they withdrew their child from Barrington.

1. Generally

In exchange for federal funds, the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, et seq., ("IDEA") requires states to identify, locate, and evaluate "all children residing in the State who are disabled . . . and who are in need of special education and related services. . . ." 20 U.S.C. § 1412(2)(C). The IDEA requires states to provide children with special needs and disabilities a "free and appropriate education." 20 U.S.C. § 1401(a)(18). The IDEA defines a "free and appropriate education" ("FEPA") [sic] as special education and related services that--

> (A) have been provided at public expense, under public supervision and direction, and without charge,

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[4] Plaintiffs also alleged that they will invest another $29,000 in tuition during the present academic year. Complaint, Exhibit B, Due Process Request, p. 9.

> (B) meet the standards of the State educational agency,
> (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and
> (D) are provided in conformity with the individualized education program ("IEP") required under section 1414(a)(5) of this title.

20 U.S.C. § 1410(a)(18). The school has a duty to establish an individual education program ("IEP") for the child. 20 U.S.C. § 1414(a)(5).[5] Each IEP must set forth, among other things, the child's current abilities, a description of the services to be provided, and progress goals.[6] 20 U.S.C.

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[5] Congress defined an IEP as follows:

> a written statement for each child with a disability developed in any meeting by a representative of the local educational agency or intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, the teacher, the parents or guardians of such child, and, whenever appropriate, such child . . . .

20 U.S.C. § 1401(a)(20).

[6] An IEP must contain:

> (A) a statement of the present levels of educational performance of such child,
> (B) a statement of annual goals, including short-term instructional objectives,

§ 1401(a)(20). Moreover, the school must review the IEP at least annually and make any necessary revisions to ensure that the child is receiving an appropriate education. 20 U.S.C. § 1414(a)(5).

The IDEA provides a relief system through which parents who disagree with the appropriateness of a proposed IEP can convey their concerns. The process begins with a complaint to the school district, followed by due process hearing at which the parents are able to voice their concerns to an impartial hearing officer of the state educational agency as determined by state law. 20 U.S.C. § 1415(b). Any party may appeal the result of this hearing to a state level review officer. 20 U.S.C. § 1415(c). Finally, any party aggrieved by the result of the hearing may bring suit in the appropriate state or federal district court. 20 U.S.C. § 1415(e)(2).

> (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs,
> (D) a statement of the needed transition services for students beginning no later than age 16 and annually thereafter (and, when determined appropriate for the individual, beginning at age 14 or younger), including, when appropriate, a statement of the interagency responsibilities or linkages (or both) before the student leaves the school setting.
> (E) the project date for initiation and anticipated duration of such services, and
> (F) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

20 U.S.C. § 1401(a)(20).

During the course of these proceedings, parents and the school are required to continue the then current educational placement of the child as set forth in the current IEP. 20 U.S.C.A. § 1415(e)(3)(A). This prerequisite of the IDEA is sometimes referred to as the "stay-put" provision. Because of the time-consuming nature of the review process, however, the Supreme Court held that parents who, before completion of that process, elect to pay for appropriate specialized education themselves may seek reimbursement of the amounts expended. School Comm. of the Town of Burlington. Mass. v. Department of Educ. of the Commonwealth of Mass., 471 U.S. 359, 370 (1985). Parents who neglect to follow the grievance procedures set forth in 20 U.S.C.A. § 1415 may render their children ineligible for free appropriate public education. Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993), citing Burlington, 471 U.S. at 373-74. "They are entitled to reimbursement only if a federal court concludes both that the public placement violated IDEA, and that the private school placement was proper under the Act." Florence County, 510 U.S. at 15. This is true because IDEA defines "free appropriate public education" as education "provided in conformity with the [IEP] required under § 1414(a)(5) of this title." 20 U.S.C.A. § 1401(a)(18)(D). When parents unilaterally change their child's educational placement by taking him out of his then current placement, he is not receiving education in "conformity with the" IEP specifically devised for him. Wise v. Ohio Dept. of Educ., 80 F.3d 177, 184 (6th Cir. 1996).

2. STATUTE OF LIMITATIONS UNDER IDEA

In the Motion for Judgment on the Pleadings, Defendants contend Plaintiffs' IDEA claims are barred by the

statute of limitations.[7] Defendants assert that Plaintiffs' claims began to accrue at the very latest, and thus, the statute of limitations began to run, when Joseph was removed from the School District to Marburn Academy in November of 1989. (See Complaint, Exhibit B, Due Process Request, p. 6.)

The IDEA, like many federal statutes, does not contain a specific statute of limitations. If a federal statute does not contain a limitations period, then a court must determine which state cause of action is most analogous to the federal one and adopt its statute of limitations if it is consistent with the policy of the federal cause of action. Wilson v. Garcia, 471 U.S. 261, 266-67 (1985). In the Sixth Circuit, the limitations period for an IDEA claim must be chosen from among the applicable state's limitations periods, and must be selected on a case-by-case basis: "[T]he nature of the actions that can be brought under [the IDEA] as well as the Act's goal of proper education of the handicapped child make the selection of state limitations periods on a case-by-case basis in imperative." Janzen v. Knox County Bd. of Educ., 790 F.2d 484, 487 (6th Cir. 1986). The question has not been addressed by this district, nor has any court sought to make an appropriate determination with regard to Ohio law.

The Sixth Circuit examined the appropriate limitations period using the statutes enacted in Tennessee. Just as here in the instant action, the particular IDEA claim asserted in

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[7] As an alternative theory, Defendants claimed that Plaintiffs' claims are barred by operation of the equitable doctrine of laches. Because the Court finds that Plaintiffs claims are ultimately barred by the statute of limitations, Defendants' arguments regarding the doctrine of laches need not be addressed.

Janzen was one for reimbursement of expenses that had already been paid by the parents of a disabled child in Tennessee. For reimbursement claims, Janzen held, the one-year limitations period prescribed by Tennessee law for personal injury actions "is simply too short a time. . . ." Id. at 488; see also Hall v. Knott County Bd. of Education, 941 F.2d 402, 408 (6th Cir. 1991) (examining statutes of limitation in Kentucky potentially applicable for IDEA claim). Ultimately, the Sixth Circuit in Janzen concluded that the reimbursement claim was in the nature of a claim for subrogation for personal services rendered, and thus the corresponding three-year Tennessee statute of limitations for such actions was most appropriate. Janzen, 790 F.2d at 488.

Defendants argue that the personal tort statute of limitations should be adopted as the most appropriate period in Ohio for IDEA claims. In Ohio, the limitations period for personal torts is two (2) years. O.R.C. § 2305.10. Defendants assert that the Janzen court did not outright reject a personal injury statute of limitations, but instead was primarily concerned with the short one-year limitations period in Tennessee for these types of injuries. Janzen, 790 F.2d at 488.[8]

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[8] The court analyzed two other circuit court decisions which had adopted a two year personal tort statutes of limitations for actions arising under IDEA. The Sixth Circuit recognized that the other circuit courts determined that such a two year time limit was appropriate and did not subordinate the goals of the Act. However, the Sixth Circuit concluded that the Tennessee analog, which only allowed one year, severely constricted the rights created by Congress in the IDEA, and was simply "too short." Janzen, 790 F.2d at 488.

Alternatively, Defendants contend that O.R.C. § 2305.09 would control, which provides a four (4) year statute of limitations for causes of action for recovery of personal property, or for taking or detaining it. O.R.C. § 2305.09. This provision, Defendants contend, is consistent with the holding of Janzen which analogized the reimbursement claim under IDEA as a cause of action for the recovery of money wrongfully withheld.

Plaintiffs, in essence, do not argue that some statute of limitations must apply. They insist instead that each case should be analyzed on a case-by-case basis, and that, in this case the presumed statute of limitations was tolled by the public school's failure to advise the parents of their rights. Plaintiffs maintain that it would be unfair to permit the School District first to fail in providing Joseph with an appropriate education, to neglect to advise his parents about their rights, and then to assert that the parents' failure to assert their unknown rights is a bar to recovery.

The parties in this action therefore debate when the cause of action accrued and thus, when the limitations period began to run. The date on which the Plaintiff's claims accrued is a matter governed by federal law. Herm v. Stafford, 663 F.2d 669 (6th Cir. 1981). The general rule under federal law is said to be that IDEA claims "accrue when the parents know or have reason to know of the injury or event that is the basis for their claim." Hall v. Knott County Bd. of Educ., 941 F.2d 402, 408 (6th Cir.1991) quoting J. Wegner, "Educational Rights of Handicapped Children," 17 Journal of Law & Education 625, 654 (1988), cert. denied, 502 U.S. 1077 (1992). The cause of action accrues when the plaintiffs learn of the injury, "whether or not they [know] the injury [is]

actionable." Id. at 409. Plaintiffs knew, of course, that the Defendants were not providing an intensive, systematic, phonics method of reading, and allege in the Complaint that Joseph was suffering terribly while he was at Barrington up until November of 1989. The James clearly knew of the injury in November of 1989, whether or not they knew the injury was actionable.

Applying these principles to the law, the Court concludes that the statute of limitations began to run in November of 1989 when Joseph was removed from the Upper Arlington School District and placed in the Marburn Academy.[9] Moreover, the Court concludes that Jansen may be fairly read as approving either the Ohio two year personal injury statute of limitations or the four year provision for recovery for wrongful taking of personal property. Here, Plaintiffs did not put the School District on notice of their intent to seek reimbursement until May of 1996. Plaintiffs received a booklet from Defendants in 1987 informing them of their rights, including their right to initiate a due process hearing. (Complaint, Exhibit S, Final Decision of the Hearing Officer, ¶¶ 6 and 7.) In their own words, the parents knew that their son was not receiving the intensive, systematic,

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[9] The Court notes that after Joseph was removed from the Upper Arlington School District in November of 1989, he has at no time returned to the district for further education. Since the School District has the obligation to educate students residing within its territory, it continues to owe such obligation to Joseph. Had Joseph returned to the School District as a student after November 1989, or if he were re-enrolled in the future, such re-entry into the public school system could require a new IEP and the potential for future due process hearings, as well as potential appeals.

phonics method of reading, and that he was suffering terribly while he was at Barrington until they removed him to Marburn Academy in November of 1989. The James knew of the injury in November of 1989, and they knew of their right to initiate a due process hearing. Their failure to pursue these procedures until 6 ½ years later constitutes a bar under either the two year statute of limitations of O.R.C. § 2305.10 for personal torts, or under the four year provision of O.R.C. § 2305.09 for wrongful taking of personal property.

The precise question of precisely which statute of limitations applies for IDEA claims in Ohio, however, must be answered by another court on another day. Since Plaintiffs here missed both the two year statute of limitations under § 2305.10 and the four year statute of limitations under § 2305.09, a final determination of which statute controls ultimately has no bearing on the outcome of the issue.

3. UNILATERAL WITHDRAWAL

Further, Plaintiffs' claim under the IDEA fails as a matter of law on a wholly separate issue. In this case, the Barrington School worked with the James' family to develop an IEP. Although the James now indicate that they lament the decision, the parents did consent to the program suggested by the School District through at least Joseph's third grade year. The James now claim that when Joseph was in the fourth grade, in 1989, the School District would not provide him with the "intensive, systematic, phonics method" of reading that the child needed to accommodate his dyslexia. The James represent that, in 1989, Joseph was suffering and not learning. (Complaint, Exhibit B, Due Process Request, p.6.) The parents then chose to withdraw Joseph, without initiating

the informal due process procedure, in November of 1989. Joseph then received services in first at Marburn Academy, then at the Gow School, and finally at Kildonan.

The parents do not claim that they ever made a formal complaint to the Barrington School or the Upper Arlington Board of Education about their child's educational placement or that they asked that Joseph be placed in a specialized school at Upper Arlington School District's expense before withdrawing the child. The parents argue that they never received proper notice that they had a right to reimbursement for tuition from having Joseph education in a special private school. The parents cite 34 C.F.R. § 300.504(a) for the proposition that the IDEA required the School District to provide adequate notice of this right.

Indeed, the IDEA does require a school district provide parents notice when it refuses to change the child's placement or proposes to change the child's placement. But here, the Upper Arlington School District neither proposed a change, nor refused to make a change requested by the parents, for the parents never made a this [sic] request. Dissatisfied with the progress that Joseph was making at the Barrington School, they moved the child without exploring the options further by way of a due process hearing.

Instead, the parents took their child out of his then current educational placement and moved him to Marburn Academy. As such, Joseph's parents unilaterally changed their son's education. Parents may not avoid the requirements of the stay-put provision of the IDEA by neglecting to give the school notice of their frustration with the child's educational placement by submitting a complaint and due

process request. 20 U.S.C. § 1415(e)(1)(A). The parents had an obligation to give the Upper Arlington School District an opportunity to explore further their concerns, and if necessary, seek an impartial due process hearing. See, e.g., Ash v. Lake Oswego Sch. Dist. No. 7J, 766 F. Supp. 852, 864 (D.Or. 1991). Having unilaterally changed their children's education placement, without initiating the administrative due process procedures, the parents are not entitled to have their son educated at public expense. Florence County, 510 U.S. at 15; Burlington, 471 U.S. at 373-74; Wise, 80 F.3d at 184.

B. The Claim Under Section 1983

The statute of limitations under § 1983 is the same as the state statute of limitations for personal injury actions. Wilson v. Garcia, 471 U.S. 261 (1985). As discussed more fully above, legal actions in Ohio for torts involving personal injuries must be brought within two (2) years. O.R.C. § 2305.10. The claims under § 1983 accrued when the Plaintiffs knew or should have known of the alleged injury, not when they become aware that such injury might be redressable. Hall v. Knott County Bd. of Educ., 941 F.2d 402, 408 (6th Cir. 1991). Thus, because the Court holds that their cause of action accrued in November of 1989, when Joseph's parents withdrew him from the School District, Plaintiffs' § 1983 claim is time barred, as well.

C. The Claim under the Rehabilitation Act

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, prohibits the practice of discriminating against an otherwise qualified person with a handicap in any program

or activity receiving federal financial aid, or in any program or activity conducted by any Executive agency, or by the United States Postal Service. Like the IDEA, the Rehabilitation Act does not provide a statute of limitations. Most courts, including the Sixth Circuit, have chosen to apply state personal injury statutes of limitation to actions under § 504 of the Rehabilitation Act. See, e.g., Southerland v. Hardaway Management, Inc., 41 F.3d 250, 254 (6th Cir. 1994); Hall v. Knott County Bd. of Educ., 941 F.2d 402 (6th Cir. 1991). For all the reasons set forth above with respect to accrual and statutes of limitation, the § 504 cause of action is also time barred.

IV.

While the Plaintiffs state a moving case, the Court cannot allow them to circumvent the resolute requirements of the applicable limitations periods or the governing substantive statutes. Thus, Defendants' Motion for Judgment on the Pleadings (Doc. 19) is **GRANTED**.

IT IS SO ORDERED.

12-12-97
DATED

/s/_____
EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed November 20, 2000]

No. 98-3048

JOSEPH JAMES, A MINOR BY AND THROUGH HIS PARENTS, NANCY JAMES AND CAMERON JAMES, ET AL.
Plaintiffs-Appellants,

v.

UPPER ARLINGTON CITY SCHOOL DISTRICT, ET AL.,
Defendants-Appellees.

BEFORE: GUY, BOGGS, and SUHRHEINRICH, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote

on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX D

PRE- AND POST-AMENDMENT STATUTES AND REGULATIONS

PRE-AMENDMENT STATUTES

20 U.S.C. § 1401 (a)(19), (20) (1994)
Definitions

(a) As used in this chapter –

(19) The term "transition services" means a coordinated set of activities for a student, designed within an outcome-oriented process, which promotes movement from school to post-school activities, including post-secondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation. The coordinated set of activities shall be based upon the individual student's needs, taking into account the student's preferences and interests, and shall include instruction, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.

(20) The term "individualized education program" means a written statement for each child with a disability developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of

children with disabilities, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include–

(A) a statement of the present levels of educational performance of such child,

(B) a statement of annual goals, including short-term instructional objectives,

(C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs,

(D) a statement of the needed transition services for students beginning no later than age 16 and annually thereafter (and, when determined appropriate for the individual, beginning at age 14 or younger), including, when appropriate, a statement of the interagency reponsibilities [sic] or linkages (or both) before the student leaves the school setting,

(E) the projected date for initiation and anticipated duration of such services, and

(F) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

In the case where a participating agency, other than the educational agency, fails to provide agreed upon services, the educational agency shall reconvene the IEP team to identify alternative strategies to meet the transition objectives.

20 U.S.C. § 1413 (a)(4)(B) (1994)
State Plans

(a) Requisite features

Any State meeting the eligibility requirements set forth in Sec. 1412 of this title and desiring to participate in the program under this subchapter shall submit to the Secretary, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as the Secretary deems necessary. Each such plan shall--

* * *

(4) set forth policies and procedures to assure–

(B) that–

(i) children with disabilities in private schools and facilities will be provided special education and related services in conformance with an individualized education program as required by this subchapter) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring provision of special education and related services to all children with disabilities within such State; and

(ii) in all such instances, the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies;

20 U.S.C. § 1414 (a)(5) (1991)
Application

(a) Requisite features

* * *

(5) provide assurances that the local educational agency or intermediate educational unit will establish or revise, whichever is appropriate, an individualized education program for each child with a disability (or, if consistent with State policy and at the discretion of the local educational agency or intermediate educational unit, and with the concurrence of the parents or guardian, an individualized family service plan described in Sec. 1477(d) for each child with a disability aged 3 to 5, inclusive) at the beginning of each school year and will then review and, if appropriate, revise its provision periodically, but not less than annually;

20 U.S.C. § 1415 (a), (b), (d), (e) (1994)
Procedural safeguards

(a) Establishment and maintenance

Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that children with disabilities and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b) Required procedures; hearing

(1) The procedures required by this section shall include, but shall not be limited to–

(A) an opportunity for the parents or guardian of a

child with a disability to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit–

(i) proposes to initiate or change, or

(ii) refuses to initiate or change, the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by the clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational

agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

* * *

(d) Enumeration of rights accorded parties to hearings

Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded–

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities,

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses,

(3) the right to a written or electronic verbatim record of such hearing, and

(4) the right to written findings of fact and decisions (which findings and decisions shall be made available to the public) consistent with the requirements of Sec. 1417(c) of this title and shall also be transmitted to the advisory panel established pursuant to Sec. 1413(a)(12) of this title.

(e) Civil action; jurisdiction

(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a

civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant relief as the court determines is appropriate.

(3)(A) Except as provided in subparagraph (B), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(B)(i) Except as provided in clause (iii), if the proceedings conducted pursuant to this section involve a child with a disability who is determined to have brought a weapon to school under the jurisdiction of such agency, then the child may be placed in an interim alternative educational setting, in accordance with State law, for not more than 45 days.

(ii) The interim alternative educational setting described in clause (i) shall be decided by the individuals described in sec 602(a)(20). (IEP team)

(iii) If a parent or guardian of a child described in clause (i) requests due process hearing pursuant to paragraph (2) of subsection (b), then the child shall remain in the alternative educational setting described in such clause during the pendency of any proceedings conducted pursuant to this section, unless the parents and the local educational agency

agree otherwise.

(iv) For the purpose of this section, the term 'weapon' means a firearm as such term is defined in section 921 of title 18, United States Code.

(2) EFFECTIVE DATE.--Paragraph (1) and the amendments made by paragraph (l) shall be effective during the period beginning on the date of enactment of this Act and ending on the date of enactment of an Act (enacted after the date of the enactment of this Act) that reauthorizes the Individuals with Disabilities Education Act.

(b) LIMITATION.--Nothing in the Individuals with Disabilities Education Act shall supersede the provisions of section 14601 of the Elementary and Secondary Education Act if a child's behavior is unrelated to such child's disability, except that this section shall be interpreted in a manner that is consistent with the Department's final guidance concerning State and local responsibilities under the Gun-Free Schools Act of 1994.

(4)(A) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

(B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a child or youth with a disability who is the prevailing party.

(C) For the purpose of this subsection, fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) No award of attorneys' fees and related costs may

be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian, if--

(i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins;

(ii) the offer is not accepted within ten days; and

(iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

(E) Notwithstanding the provisions of subparagraph (D), an award of attorneys' fees and related costs may be made to a parent or guardian who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Whenever the court finds that--

(i) the parent or guardian, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, experience, and reputation; or

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding, the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this subsection.

(G) The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final

resolution of the action or proceeding or there was a violation of this section.

PRE-AMENDMENT REGULATIONS

34 C.F.R. § 300.342 (1975)
When individualized education programs must be in effect

(a) At the beginning of each school year, each public agency shall have in effect an IEP for every child with a disability who is receiving special education from that agency.

(b) An IEP must–

(1) Be in effect before special education and related services are provided to a child; and

(2) Be implemented as soon as possible following the meetings under § 300.343.

34 C.F.R. § 300.346 (1993)
Content of individualized education program

(a) General. The IEP for each child must included–

(1) A statement of the child's present levels of educational performance;

(2) A statement of annual goals, including short-term instructional objectives;

(3) A statement of the specific special education and related services to be provided to the child and the extent that the child will be able to participate in regular educational programs;

(4) The projected dates for initiation of services and the anticipated duration of the services; and

(5) Appropriate objective criteria and evaluation

procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved.

(b) Transition services.

(1) The IEP for each student, beginning no later than age 16 (and at a younger age, if determined appropriate), must include a statement of the needed transition services as defined in § 300.18, including, if appropriate, a statement of each public agency's and each participating agency's responsibilities or linkages, or both, before the student leaves the school setting.

(2) If the IEP team determines that services are not needed in one or more of the areas specified in § 300.18 (b)(2)(i) through (b)(2)(iii), the IEP must include a statement to that effect and the basis upon which the determination was made.

34 C.F.R. Pt. 300, App. C, Question 6 (1993)

6. If a child with a disability has been receiving special education in one LEA and moves to another community, must the new LEA hold an IEP meeting before the child is placed in a special education program?

It wold not be necessary for the new LEA to conduct an IEP meeting if:

(1) A copy of the child's current IEP is available; (2) the parents indicate that they are satisfied with the current IEP; and (3) the new LEA determines that the current IEP is appropriate and can be implemented as written.

If the child's current IEP is not available, or if either the LEA or the parent believes that it is not appropriate, an IEP meeting would have to be conducted. This meeting should take place within a short time after the child enrolls in

the new LEA (normally, within one week).

Note: The child must be place in a special education program immediately after the IEP is finalized. (See Question 4, above.)

If the LEA or the parents believe that additional information is needed (e.g., the school records from the former LEA) or that a new evaluation is necessary before a final placement decision can be made, it would be permissible to temporarily place the child in an interim program before the IEP is finalized. (See Question 5, above.)

POST-AMENDMENT STATUTES

20 U.S.C. § 1412 (a)(10) (1997)
State Eligibility

(a) In general

* * *

(10) Children in private schools

(A) Children enrolled in private schools by their parents

(i) In general

To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary and secondary schools, provision is made for the participation of those children in the program assisted or carried out under this part by providing for such children special education and related services in accordance with the following requirements, unless the Secretary has arranged for services to those children under subsection (f):

(I) Amounts expended for the provision of those

services by a local educational agency shall be equal to a proportionate amount of Federal funds made available under this part.

(II) Such services may be provided to children with disabilities on the premises of private, including parochial, schools, to the extent consistent with law.

(ii) Child-find requirement

The requirements of paragraph (3) of this subsection (relating to child find) shall apply with respect to children with disabilities in the State who are enrolled in private, including parochial, elementary and secondary schools.

(B) Children placed in, or referred to, private schools by public agencies

(i) In general

Children with disabilities in private schools and facilities are provided special education and related services, in accordance with an individualized education program, at no cost to their parents, if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this part or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State.

(ii) Standards

In all cases described in clause (i), the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies.

(C) Payment for education of children enrolled in private schools without consent of or referral by the public agency

(i) In general

Subject to subparagraph (A), this part does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

(ii) Reimbursement for private school placement

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

(iii) Limitation on reimbursement

The cost of reimbursement described in clause (ii) may be reduced or denied--

(I) if--

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense;

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in division

(aa);

(II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in Sec. 1415 (b)(7), of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or

(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(iv) Exception

Notwithstanding the notice requirements in clause (iii)(I), the cost of reimbursement may not be reduced or denied for failure to provide notice if–

(I) the parent is illiterate and cannot write in English;

(II) compliance with clause (iii)(I) would likely result in physical or serious emotional harm to the child;

(III) the school prevented the parent from providing such notice; or

(IV) the parents had not received notice, pursuant to Sec. 1415, of the notice requirement in clause (iii)(I).

20 U.S.C. § 1414 (d)(1), (4) (1997)
Evaluations, eligibility determinations, individualized education programs, and educational placements

(d) Individual education programs

(1)Definitions

As used in this title:

(A) Individualized education program

The term 'individualized education program' or 'IEP' means a written statement for each child with a disability that

is developed, reviewed, and revised in accordance with this section and that includes–

(i) a statement of the child's present levels of educational performance, including–

(I) how the child's disability affects the child's involvement and progress in the general curriculum; or

(II) for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities;

(ii) a statement of measurable annual goals, including benchmarks or short-term objectives, related to–

(I) meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum; and

(II) meeting each of the child's other educational needs that result from the child's disability;

(iii) a statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child–

(I) to advance appropriately toward attaining the annual goals;

(II) to be involved and progress in the general curriculum in accordance with clause (i) and to participate in extracurricular and other nonacademic activities; and

(III) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this paragraph;

(iv) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in clause (iii);

(v)(I) a statement of any individual modifications in

the administration of State or districtwide assessments of student achievement that are needed in order for the child to participate in such assessment; and

(II) if the IEP Team determines that the child will not participate in a particular State or districtwide assessment of student achievement (or part of such an assessment), a statement of--

(aa) why that assessment is not appropriate for the child; and

(bb) how the child will be assessed;

(vi) the projected date for the beginning of the services and modifications described in clause (iii), and the anticipated frequency, location, and duration of those services and modifications;

(vii)(I) beginning at age 14, and updated annually, a statement of the transition service needs of the child under the applicable components of the child's IEP that focuses on the child's courses of study (such as participation in advanced-placement courses or a vocational education program);

(II) beginning at age 16 (or younger, if determined appropriate by the IEP Team), a statement of needed transition services for the child, including, when appropriate, a statement of the interagency responsibilities or any needed linkages; and

(III) beginning at least one year before the child reaches the age of majority under State law, a statement that the child has been informed of his or her rights under this title, if any, that will transfer to the child on reaching the age of majority under Sec. 1415(m); and

(viii) a statement of--

(I) how the child's progress toward the annual goals described in clause (ii) will be measured; and

(II) how the child's parents will be regularly informed

(by such means as periodic report cards), at least as often as parents are informed of their nondisabled children's progress, of–

(aa) their child's progress toward the annual goals described in clause (ii); and

(bb) the extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year.

(B) Individualized education program team

The term 'individualized education program team' or 'IEP Team' means a group of individuals composed of–

(i) the parents of a child with a disability;

(ii) at least one regular education teacher of such child (if the child is, or may be, participating in the regular education environment);

(iii) at least one special education teacher, or where appropriate, at least one special education provider of such child;

(iv) a representative of the local educational agency who–

(I) is qualified to provide or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

(II) is knowledgeable about the general curriculum; and

(III) is knowledgeable about the availability of resources of the local educational agency;

(v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi);

(vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and

(vii) whenever appropriate, the child with a disability.

* * *

(4) Review and revision of IEP

(A) In general

The local educational agency shall ensure that, subject to subparagraph (B), the IEP Team–

(i) reviews the child's IEP periodically, but not less than annually to determine whether the annual goals for the child are being achieved; and

(ii) revises the IEP as appropriate to address–

(I) any lack of expected progress toward the annual goals and in the general curriculum, where appropriate;

(II) the results of any reevaluation conducted under this section;

(III) information about the child provided to, or by, the parents, as described in subsection (c)(1)(B);

(IV) the child's anticipated needs; or

(V) other matters.

(B) Requirements with respect to regular education teacher

The regular education teacher of the child, as a member of the IEP Team, shall, to the extent appropriate, participate in the review and revision of the IEP of the child.

POST-AMENDMENT REGULATIONS

34 C.F.R. § 300.344 (a) (1999)
IEP team.

(a) *General*. The public agency shall ensure that the IEP team for each child with a disability includes–

(1) The parents of the child;

(2) At least one regular education teacher of the child (if the child is or may be, participating in the regular education environment);

(3) At least one special education teacher of the child, or if appropriate, at least one special education provider of the child:

(4) A representative of the public agency who–

(i) Is qualified to provide, or supervise the provision of, specifically designed instruction to meet the unique needs of children with disabilities;

(ii) Is knowledgeable about the general curriculum; and

(iii) Is knowledgeable about the availability of resources of the public agency;

(5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (a)(2) through (6) of this section;

(6) At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and

(7) If appropriate, the child.

34 C.F.R. § 300.346 (b) (1999)
Development, review, and revision of IEP.

(b) *Review and Revision of IEP.* In conducting a meeting to review, and, if appropriate, revise a child's IEP, the IEP team shall consider the factors described in paragraph (a) of this section.

34 C.F.R. § 300.347 (a) (1999)
Content of IEP.

(a) *General*. The IEP for each child with a disability must include–

(l) A statement of the child's present levels of educational performance. including–

(i) How the child's disability affects the child's involvement and progress in the general curriculum (i.e., the same curriculum as for nondisabled children): or

(ii) For preschool children, as appropriate, how the disability affects the child's participation in appropriate activities;

(2) A statement of measurable annual goals, including benchmarks or short-term objectives, related to–

(i) Meeting the child's needs that result from the child's disability, to enable the child to be involved in and progress in the general curriculum (i.e., the same curriculum as for nondisabled children), or for preschool children, as appropriate, to participate in appropriate activities; and

(ii) Meeting each of the child's other educational needs that result from the child's disability;

(3) A statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and a statement of the program modifications of supports for school personnel that will be provided for the child–

(i) To advance appropriately toward attaining the annual goals;

(ii) To be involved and progress in the general curriculum in accordance with paragraph (a)(1) of this section and to participate in extracurricular and other nonacademic activities; and

(iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section;

(4) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in paragraph (a)(3) of this section;

(5)(i) A statement of any individual modifications in the administration of State or district-wide assessments of student achievement that are needed in order for the child to participate in the assessment; and

(ii) If the IEP team determines that the child will not participate in a particular State or district-wide assessment of student achievement (or part of an assessment), a statement of-

(A) Why that assessment is not appropriate for the child; and

(B) How the child will be assessed.

(6) The projected date for the beginning of the services and modifications described in paragraph (a)(3) of this section, and the anticipated frequency, location, and duration of those services and modifications; and

(7) A statement of-

(i) How the child's progress toward the annual goals described in paragraph (a)(2) of this section will be measured; and

(ii) How the child's parents will be regularly informed (through such means as periodic report cards), at least as often as parents are informed of their nondisabled children's progress, of-

(A) Their child's progress toward the annual goals; and

(B) The extent to which that progress is sufficient to

enable the child to achieve the goals by the end of the year.

34 C.F.R. § 300.401 (1999)
Responsibility of State educational agency.

Each SEA shall ensure that a child with a disability who is placed in or referred to a private school or facility by a public agency–

(a) Is provided special education and related services–

(1) In conformance with an IEP that meets the requirements of §§ 300.340-300.350; and

(2) At no cost to the parents;

(b) Is provided an education that meets the standards that apply to education provided by the SEA and LEAs (including the requirements of this part); and

(c) Has all of the rights of a child with a disability who is served by a public agency.

34 C.F.R. § 300.403 (d) (1999)
Placement of children by parents if FAPE is at issue

(d) *Limitation on reimbursement.* The cost of reimbursement described in paragraph (c) of this section may be reduced or denied–

(1) If–

(i) At the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP team that they were rejecting the placement proposed by the public agency to provide FAPE [free appropriate public education] to their child, including stating their concerns and their intent to enroll their child in a private school at pubic expense; or

(ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section;

(2) If, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in § 300.503 (a)(1), of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation; or

(3) Upon a judicial finding of unreasonableness with respect to the actions taken by the parents.

(e) *Exceptions*. Notwithstanding the notice requirement in paragraph (d)(1) of this section, the cost of reimbursement my not be reduced or denied for failure to provide the notice if-

(1) The parent is illiterate and cannot write in English;

(2) Compliance with paragraph (d)(1) of this section would likely result in physical or serious emotional harm to the child;

(3) The school prevented the parent from providing the notice; or

(4) The parents had not received notice, pursuant to section 615 of the Act, of the notice requirement in paragraph (d)(1) of this section.

34 C.F.R. § 300.454 (a)(1) (1999)
Services determined.

(a) *No individual right to special education and related services*. (1) No private school child with a disability has an

individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school.

34 C.F.R. Pt. 300, App. A, Question 17 (1999)

17. If a disabled child has been receiving special education from one public agency and transfers to another public agency in the same State, must the new public agency develop an IEP before the child can be placed in a special education program?

If a child with a disability moves from one public agency to another in the same State, the State and its public agencies have an ongoing responsibility to ensure that FAPE is made available to that child. This means that if a child moves to another public agency the new agency is responsible for ensuring that the child has available special education and related services in conformity with an IEP.

The new public agency must ensure that the child has an IEP in effect before the agency can provide special education and related services. The new public agency may meet this responsibility by either adopting the IEP the former public agency developed for the child or by developing a new IEP for the child. (The new public agency is strongly encouraged to continue implementing the IEP developed by the former public agency, if appropriate, especially if the parents believe their child was progressing appropriately under that IEP.)

Before the child's IEP is finalized, the new public agency may provide interim services agreed to by both the parents and the new public agency. If the parents and the new agency are unable to agree on an interim IEP and placement, the new public agency must implement the old IEP

to the extent possible until a new IEP is developed and implemented.

In general, while the new public agency must conduct an IEP meeting, it would not be necessary if: (1) A copy of the child's current IEP is available; (2) the parents indicate that they are satisfied with the current IEP; and (3) the new public agency determines that the current IEP is appropriate and can be implemented as written.

If the child's current IEP is not available, or if either the new public agency or the parent believes that it is not appropriate, the new public agency must develop a new IEP through appropriate procedures within a short time after the child enrolls in the new public agency (normally, within one week).

OPPOSITION

BRIEF

No. 00 - 1337

Supreme Court, U.S.
FILED
MAR 22 2001
CLERK

In the Supreme Court of the United States

UPPER ARLINGTON CITY SCHOOL DISTRICT BOARD OF EDUCATION, et al.

Petitioners,

v.

JOSEPH JAMES, a minor by and through his parents, NANCY JAMES and CAMERON JAMES; NANCY JAMES; CAMERON JAMES,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a child with a disability who is unilaterally removed from an inappropriate public school special education program, must return to the inappropriate program in order to be eligible for special education services under IDEA?

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I. STATEMENT OF THE CASE

A. OVERVIEW

In September, 1985, Joseph James began attending Upper Arlington Public Schools. He has dyslexia. In November, 1989, his parents removed him from the public school's special education program because he has not been taught to read by the school district. Joe was placed by his parents into a private special education school. After several months in the private program, Joe began learning how to read. In 1990, the parents attempted to return Joe to the public school with the expectation that the school would teach Joe how to read. The school district refused to offer an IEP until after Joe left the private school and returned to public school.

The parents could not gamble with their son's education. In 1994, the parents again approached the Director of Special Education seeking Joe's return. She told them, "Don't bring him back." In 1996, pursuant to the Individuals with Disabilities Education Act, the parents requested a due process hearing seeking reimbursement for their son's past educational expenses and an IEP for the present and future.

The school district refused to offer an IEP until Joe was enrolled. The district asserted that the parents were not entitled to any reimbursement because they did not initiate a request for a due process hearing before Joe's removal in November, 1989.

The Sixth Circuit held that the school district should have offered an IEP to Joe James in 1994 when the parents attempted to return him to public school. The school district argues that this ruling creates a split among circuits and requests this Court to grant a writ of certiorari. The ruling does not create a split.

Upper Arlington is attempting to create law which would require disabled children who have been removed from an inappropriate educational placement, must return to that inappropriate placement before a school district is responsible for presenting the parents and child with an IEP.

B. FACTS AND COURSE OF PROCEEDINGS

Joseph James is a very bright child with dyslexia.[1] (JA 70, 100, 104) In September, 1985, beginning with Kindergarten until November, 1989 of his fourth grade year, Joseph attended school in the Upper Arlington school district. (JA 46-53) Although Joe received special education for several years, he was not taught to read. (JA 18) Upper Arlington School District unsuccessfully used the commercialized Reading Recovery® program[2] with Joe. (JA 11-16)

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[1] (JA #) refers to the Joint Appendix on file with the U. S. Court of Appeals for the Sixth Circuit.

[2] At that time, Reading Recovery® was an experimental "whole language" program to "recover" children from reading problems. Reading Recovery® was initiated in New Zealand, and first tested in the United States in the Upper Arlington / Columbus, Ohio school districts. Reading Recovery® is now engaged in a commercial joint venture with Upper Arlington

In June, 1987, Upper Arlington convened an IEP meeting to develop an IEP for the following school year. At this June, 1987 meeting, Mrs. James:

> . . . described in great detail the type of method we thought Joe needed. It should be a multi-sensory, intense, systematic, phonetic approach . . . They suggested that if you tried to teach Joe the parts he would just become more confused and frustrated . . . Instead of the team focusing on why Reading Recovery had failed Joe, the focus was on why Joe had failed Reading Recovery . . . None of the (educators) ever challenged the appropriateness of using Reading Recovery with our dyslexic child. (Exhibit D, attached to Complaint.) (JA 7, 10, 37, 40)

In October, 1989, when Joe was in fourth grade, his mother attended a meeting with school staff. Joe's reading skills were below the first grade level. The parents were told to accept that Joe would never learn to read. (JA 52) The parents did not accept this assertion. In November, 1989, the parents withdrew Joe from Barrington Elementary School and enrolled him into Marburn Academy, a private special education school. Joe began to learn how to read. (JA 52-54).

School District and Ohio State University. (JA 12-14, 22-23, 25-26, 38-41, 47-50, 58-59)

In March 5, 1990, and April 6, 1990 (JA 97), four months later, the parents wrote to the public school and said that they "planned to re-enroll Joe in Barrington for the 1990-1991 school year." (JA 53-54) There were meetings and letters between the parents and school staff. The school principal told the parents that the public school "would not develop an IEP for Joe until we withdrew him from Marburn Academy and enrolled (Joe) at Barrington School." The principal added that any such program would be based "upon district service guidelines and available resources." (JA 96, 98) Joe's father stated in the subsequent affidavit[3] filed with the special education due process hearing officer and with the U. S. District Court, that

> 97. On April 9, 1990, Mr. Oakley wrote that Upper Arlington would not develop an IEP for Joe until we withdrew him from Marburn Academy and enrolled (Joe) at Barrington School. Since Barrington refused to meet with us to develop an IEP, we were denied information as to what special education services Joe would receive if we enrolled him back in Barrington.
>
> . . .
>
> 99. As parents, we needed to know what services Barrington were going to provide before enrolling him back into

[3] At no stage in these proceedings has the school district filed a cross-affidavit denying the truth of the affidavit.

their program. When they refused to meet with us to develop an IEP for Joe, we realized that we had no viable choice other than to have Joe continue at Marburn where he had made progress.

100. ... Ms. Ford (School Psychologist) did not believe in reading remediation or having Joe receive intense instruction so that he would learn to read. She felt we were wrong in our approach.

101. It was our understanding that our only option was to return Joe to the Upper Arlington School District where Joe would have to learn from sources other than reading. We learned that Upper Arlington School District would not teach Joe how to read. If we wanted Joe to learn how to read, it was our understanding from all of the staff within the Upper Arlington School District that Joe would have to be educated elsewhere. (JA 54-55)

Mr. James explained that:

Joe started Marburn Academy in November (1989). At the end of the school year Paula Ford, the Upper Arlington psychologist went to Marburn and tested Joe. During his five months at Marburn Joe experienced a

> year's growth in reading. To me this meant Joe was on the right course for the first time since he started school. It meant that Paula Ford might be wrong about Joe having to learn there are other ways to get information besides reading. Joe could learn to read when he received an appropriate education.(JA 43)

The parents were expected to place their son back into the setting that had failed him.

Later, the parents placed Joe into Kildonan School, a specialized boarding school for children with severe dyslexia.[4] At Kildonan, Joe received intensive instruction in reading and written language. (JA 44)

In 1994, four years after Joe left the public school program, his parents again approached Upper Arlington about returning their son to the public school program. The school had a policy that a child had to be removed from the private school, enrolled in and attend Upper Arlington schools before an IEP would be written. The parents met with Ms. Meadows, the new Director of Special Education, and discussed Joe's return home so that he could enroll in and attend Upper Arlington public schools. Later, on

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[4] Kildonan School is discussed extensively in *Evans v. Board of Educ. of Rhinebeck Cent. Sch. Dist.*, 930 F.Supp. 83 (S.D. N.Y. 1996). The opinion contains an excellent discussion about dyslexia, how dyslexics have to be taught in order to learn, and the measurement of educational benefit.

Wednesday, April 6, 1994, in a continuing attempt to bring their son home from boarding school, Mr. and Mrs. James took Ms. Meadows to dinner at the "55 Grill" to discuss Joe's return to Upper Arlington.

She advised the parents that Upper Arlington did not have a program that was appropriate for Joe. She said, "Don't bring him back now, give me a couple of years to get someone trained." (JA 56) Upper Arlington School District has never refuted the truth of this statement.

1. Request for Special Education Due – Process Hearing

On May 13, 1996, Joe James' parents requested a special education due process hearing to recover the costs of their son's education at Kildonan School. (JA 37) Consistent with their position, Upper Arlington School District refused to offer an IEP to Joe unless he returned to the Upper Arlington School District. (Joe has since graduated from Kildonan School.)

On July 22, 1996, Upper Arlington Public Schools filed a "Motion to Dismiss, or in the Alternative, for Summary Judgment" with the Administrative Hearing Officer (AO).(JA 106)

Upper Arlington School District asserted that the parents' request for reimbursement should be denied and the due process hearing should be dismissed because the parents failed to comply with the "stay-put" provision of the Individuals with Disabilities

Education Act. That was the primary issue of this case. Parents made a unilateral removal of their child from the public school program without first requesting a special education due process hearing against the school district.

A reply brief, which included the August 20, 1996 Affidavit from Mr. James, was filed on behalf of Joseph James. (JA 46, 106) The Affidavit later became an Exhibit attached to the Complaint that was filed with the U. S. District Court, and incorporated into the District Court pleadings, by reference.

The AO reported that:

> The Upper Arlington School District contends that the Request for Impartial Due Process hearing filed by Cameron James on May 13, 1996 must be dismissed due to the unilateral withdrawal of Joseph James from the Upper Arlington School District in November 1989 without first exhausting the grievance procedures set forth in 20 U.S.C.A. §1415. The school district relies upon *Wise v. Ohio Dept. of Education*, 80 F.3d 177 (6th Cir. 1996), hereinafter referred to as *Wise*. (JA 112)

The AO then noted that:

> Cameron and Nancy James concede that they unilaterally removed Joseph James

> from the Upper Arlington School District without first exhausting the grievance procedures set forth in 20 U.S.C.A. § 1415, but argue that the door to the courthouse should not be slammed in the face of parents who are carried there on the horns of a dilemma. Parents, they argue should not be forced to choose between two equally untenable positions. Parents can leave their child in an educationally damaging environment and protect their right to tuition reimbursement, or they can protect their child by unilaterally moving the child to an educationally appropriate environment, and lose their right to tuition reimbursement. Similar arguments were rejected by the Court in *Wise*. (JA 113)

2. Due Process Decision

The Administrative Hearing Officer accepted the arguments of law proffered by Upper Arlington and granted the school district's Motion to Dismiss. (JA 105-116)

3. Review Officer Decision

The parents appealed the Hearing Officer's decision. On December 31, 1996, the Review Officer upheld the dismissal. (JA 119-126) He stated:

> 3. Plaintiff's Request for Reimbursement for Retroactive and Prospective Tuition is barred by Plaintiff's unilateral removal of their child from the Upper Arlington City School District without first exhausting the grievance procedures set forth in 20 U.S.C.A. section 1415.
>
> 4. This matter having been resolved as set forth above, the question of whether Plaintiffs' Request for Reimbursement for Retroactive and Prospective Tuition is barred by the Statute of Limitations is moot, and need not be ruled upon. (JA 121-122)

Whether Joseph James had or had not **enrolled** in the Upper Arlington School District in 1994 when the parents sought to return him to public school was not an issue in the case at that time, nor was it addressed in any depth in the affidavits. The issue was simply the statute of limitations and the parents' failure to request a special education due process hearing before removing Joe from Barrington School. The issues in this case changed between the final District Court Order and the Sixth Circuit briefing.

In *James v. Upper Arlington School District*, a due process hearing was never held. There has been no testimony. There is no "Administrative Record" of either testimony or trial exhibits. The Due Process and Review Hearings were decided on an issue of

caselaw, i.e., *Wise v. Ohio Dept. of Educ.*, 80 F. 3d 177 (6th Cir. 1996).

4. U. S. District Court

On February 12, 1997, a Complaint was filed by Joseph James and his parents in the U. S. District Court, effectively appealing the decision of the Review Officer. (JA 7) Since no evidence had been heard or testimony received, the Complaint was detailed and very factual.

On December 15, 1997, the Honorable Edmund A. Sargus, Jr. granted the school district's Motion to Dismiss. (Pet. 15a-33a) (JA 211-226) The essence of the Court's ruling was that:

> Having unilaterally changed their children's education placement, without initiating the administrative due process procedures, the parents are not entitled to have their son educated at public expense. Florence County, 510 U.S. at 15; Burlington, 471 U.S. at 373-374, Wise, 80 F. 3d at 184. (Pet. 32a) (JA 224)

From the initial due process hearing through the District Court, the primary issue was the parent's failure to request a special education due process hearing prior to removing Joseph James from Barrington Elementary School.

In footnote nine of that Order, the Court added:

> The Court notes that after Joseph was removed from the Upper Arlington School District in November of 1989, he has at no time returned to the district for further education. Since the School District has the obligation to educate students residing within its territory, it continues to owe such obligation to Joseph. Had Joseph returned to the School District as a student after November, 1989, or if he were re-enrolled in the future, such re-entry into the public school system could require a new IEP and the potential for future due process hearing, as well as potential appeals. (Pet. 29a) (JA 11) (Emphasis added by the Court.)

The Court added an additional requirement and condition that had to be met. The child must be returned to the public school that failed the child before an IEP was required.

On January 7, 1998, this Respondent filed a Motion and Memorandum to Reconsider with the District Court arguing that:

> This Court has dismissed the parents' claim for retroactive tuition reimbursement that were either two or four years prior to May 13, 1996. Still pending is their request for tuition

> reimbursement beginning on either May 13, 1994 or May 13, 1992 through the present. They requested a special education due process hearing. The Complaint in this Court is a continuation and exhaustion of those proceedings. It is respectfully asserted that the Court's ruling in regard to the Statute of Limitations should not deprive the parent's of their right to pursue reimbursement from May 13, 1992 through the present. (page 5)

The Court dismissed the Motion for Reconsideration explaining: (JA 145)

> Further, the Court notes that the plaintiffs have mischaracterized the effect of the Order of Dismissal in this case. On page 9 of the Order, the Court explained in footnote 9 that at no time has the child returned to the district for further education. While the district may have a continuing legal obligation to educate the child, the Opinion specifically notes that claims arising after November of 1989 could only escape the applicable statute of limitations upon a reenrollment of the child in the defendant's school system.

The District Court established that the child's enrollment in the public school was a condition

precedent to the school district being required to offer an IEP to a child.

The parents filed an appeal with the Sixth Circuit.

5. U. S. Court of Appeals for the Sixth Circuit

Unknown to the District Court or counsel, two days before the District Court's final ruling, in another IDEA case, the Sixth Circuit affirmed the essence of respondent's arguments.[5] Several months later, the Sixth Circuit issued another IDEA ruling, noting that federal law required school districts to develop an IEP for a child, even if the child was enrolled in a private school.[6]

In *Doe* and *Boss*, before *James* was briefed and argued, the Sixth Circuit clarified *Wise,* noting that a parent did not have to request a special education due process hearing prior to a unilateral placement, and the child did not have to be enrolled in a public school as a condition of being offered an IEP.

Previously, Upper Arlington School District presented two theories of their case. The first was a statute of limitations defense. The second was that the parent had to request a due process hearing before making a unilateral placement. Affidavits focused on

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[5] See *Doe v. Metropolitan Nashville Public Schools,* 133 F. 3rd 384 (6th Cir. 1998)

[6] See *Cleveland Heights-Univ. Heights City Sch. Dist. v. Boss,* 144 F.3d 391 (6th Cir. 1998)

these issues and not the meetings in 1994. While continuing with the statute of limitations defense, in light of *Doe* and *Boss*, Upper Arlington needed a different theme. Footnote nine in the District Court's Order provided the "enrollment before IEP" strategy.

On September 28, 2000, the United States Court of Appeals issued their decision in *James, et. al. v. Upper Arlington School District, et. al,*. A child with a disability did not have to be enrolled in public school as a condition to being offered an IEP. This holding clarified the dicta in *Boss*. The school district filed a petition for rehearing. On November 20, 2000, the Court entered an Order stating that the petition was circulated "not only to the original panel members but also to all other active judges of the court, and no judge of this court . . . requested a vote on the suggestion for rehearing en banc . . . (and) Accordingly, the petition is denied." (Pet. 34a-35a)

The Sixth Circuit synthesized the facts of the lower proceedings noting that:

> The Administrative Officer never reached the merits of whether Joseph had an appropriate individual education plan, nor was there an evidentiary hearing, because the AO accepted the school district's argument that the Jameses had not followed proper procedures, and therefore granted the district's motion to dismiss. A state level review officer affirmed the

AO's decision, based on the grounds that the parents had unilaterally withdrawn their son without first pursuing the appropriate administrative remedies.

The district court granted judgment on the pleadings to the school district in a December 15, 1997 order, holding that the statute of limitations had begun to run in November 1989 when Joseph was removed from the school district and had expired no more than four years later, long before the current action began. The district court noted that the Jameses had known of their right to initiate a due process hearing in 1989, but had failed to do so until 1996. Because they failed to pursue administrative relief before removing their son from public school, and because the statute of limitations has run, the district court concluded that the Jameses are no longer entitled to an education at public expense. We disagree with the district court that the Jameses did not give the school district an adequate opportunity to correct Joseph's educational program. Although we affirm the judgment of the district court with regard to Joseph's 1989 removal and the 1990 rebuffed request for an IEP on statute of limitations

> grounds, we **remand** the case for further proceedings on the separate subsequent cause of action that arose in 1994 and may have been timely pursued in 1996. (Pet. 3a-4a) (Emphasis added.)

The Court was familiar with the negotiations and meetings between the parents and school staff in early 1990. The parents wanted to return Joe to Barrington Elementary School, but wanted assurance that the school officials would try to teach Joe how to read, without using Reading Recovery®.

Joe was learning how to read at Marburn; he gained one year of reading skills in five months. (JA 43) Upper Arlington "did not believe in reading remediation or having Joe receive intense instruction so that he would learn to read." (JA 54-55) Before returning Joe to Barrington Elementary and the Upper Arlington Public Schools, the parents needed to see the IEP. The school's position then, and in 1994, and throughout the pleadings filed in this case, was that Joe had to be re-enrolled before the school district had an obligation to offer an IEP.

While the Court upheld the statute of limitations defense, the Court noted that:

> The Jameses' 1994 interaction with the school district suggests that a new cause of action arose prior to their 1996 request for a due process hearing. Taking all the well-pleaded facts as true,

as we must on a motion to dismiss, the Jameses made contact with the school system about returning their son in 1994 and having a new IEP done, but were essentially rebuffed. Although Joseph was never enrolled, and the school district never refused to enroll him or to do a *post*-enrollment IEP, the district did discourage the Jameses from re-enrolling Joseph. Furthermore, the district told the Jameses that their child would have to be re-enrolled before the school district would be obligated to do a new IEP for him. (Pet. 5a-6a)

. . .

The excusable state of affairs apparently came to an end in 1994 when the parents specifically approached the school district about re-enrollment and obtaining a new IEP, even though the Jameses did not request a due process hearing at that point in time. If the Jameses' rights were in any way violated at that point, a cause of action arose at that time separate from any that arose in 1989. **We hold that refusing to do an IEP pre-enrollment constitutes such a violation.** See *Cleveland Heights-Univ. Heights City Sch. Dist. v. Boss*, 144 F.3d 391, 393 (6th Cir. 1998) (noting in passing that federal law required development of an IEP for a child still enrolled in a private school). To hold

otherwise would allow the school to slough off any response to its duty until the parents either performed the futile act of enrolling their son for one day and then withdrawing him as soon as the IEP was complete, or, worse, leaving the child in an arguably inadequate program for a year just to re-establish his legal rights. Neither action seems to be compelled by the statutory scheme or the case law. Nor does the failure to request a due process hearing in 1994 vitiate the cause of action that accrued in 1994. Rather, the request for a hearing made in 1996 preserved the earlier claim as well as the claim relating to the 1996-1997 school year. (Pet. 6a-7a) (Emphasis added.)

. . .

(T)hey did approach the school district in 1994 and were denied an IEP. That latter circumstance gives them a cause of action, even though their earlier action does not. Under the circumstances presented to the court, we hold that the plaintiffs cannot recover their expenses retroactively between 1989-94, but can pursue a claim regarding tuition after the Jameses approached the school district in 1994 and were rebuffed.

> For the above reasons we AFFIRM the judgment of the district court in part, REVERSE it in part, and remand the case to the district court for further proceedings consistent with this opinion. (Pet. 10a)

II. SUMMARY OF ARGUMENT

The Sixth Circuit's ruling in *James* has not created a split with any Circuit. Neither *James*, nor the caselaw cited by the Petitioners, concerns private school services for disabled children. The *"Carter"* Amendment of IDEA is clear and the Courts of Appeal do not need guidance.

III. ARGUMENT

The Petitioner's argue that a child must be re-enrolled in the school district that harmed the child before the district has an obligation to convene an IEP meeting.

The Petitioner's argument does not deny that the parents met with the Director of Special Education in 1994 and were told "don't bring him back." Query - How can parents enroll a child into a school district that says "Don't bring him back"?

Public schools are required to provide a free appropriate public education to children with disabilities. When it is determined that the program provided is damaging the child, and the parent removes the child from the program, parents often

place the child into a special education private school that specializes in providing an appropriate education to children.[7] Upper Arlington told the parents that Joe would "have to learn from sources other than reading. We learned that Upper Arlington School District would not teach Joe how to read. If we wanted Joe to learn how to read, it was our understanding from all of the staff within the Upper Arlington School District that Joe would have to be educated elsewhere." (JA 54-55)

Upper Arlington School District argues that they did not have sufficient facts to know that the parents were dissatisfied in 1994. Yet they stated, "Don't bring him back." The Petitioner's Statement of Facts omits voluminous information about the parents' numerous meetings with the school staff in 1990 and again in 1994, when they attempted to secure an appropriate education for their son.

The parents acted as reasonable conscientious parents should. They did not return Joe to the public school. They asked for an IEP that addressed Joe's need to acquire reading skills. An IEP was never written.

A. The Circuits are not Split

Upper Arlington School District represents that there is a "split among circuits," in an attempt to encourage this Court to grant certiorari. Petitioners incorrectly

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[7] See *Burlington School Comm. v. Dept. of Education*, 471 U.S. 359 (1985) and *Florence County School District IV v. Shannon Carter*, 510 U. S. 7 (1993).

assert that the decision below conflicts with the decisions of other circuits. To the contrary, every case they cite is easily distinguishable. The Circuits have not split concerning issues of "enrollment before IEP," "due process before unilateral removal," the newly enacted *Carter* amendment, or any of the legal issues in *James*. There is no split among circuits.

For example, Upper Arlington argues that *James* conflicts with the Third Circuit ruling in *Bernardsville Bd. of Educ. v. J.H.*, 42 F.3d 149, 21 IDELR 1097 (3rd Cir. 1994). In their brief, the School District stated that:

> If the Sixth Circuit's opinion is allowed to stand, any time a parent even discusses the possibility of returning their child from a private placement, a school district will have to prepare an IEP for the child even though the parents have never asked for one and may have no real intention of returning their child to the public school. (Pet. 22, see also page 8)

In *Bernardsville* , the Court awarded reimbursement to the parents for their child's unilateral placement. Like *James*, the public school was aware of the parent's dissatisfaction with their program.

> The fact that the school district was notified of the parents' dissatisfaction, albeit not through the initiation of

> official proceedings, from the very first summer that J.H. attended Landmark, that the parents did request a new placement for J.H., and that there was continued contact between the school district and J.H. for the duration of J.H.'s enrollment at Landmark support Mr. and Mrs. H's argument. **There is no evidence whatsoever that J.H.'s parents acted in bad faith,** and given the apparent severe deficiencies in the IEPs developed for J.H. at Bernardsville, it is clear that J.H.'s parents acted reasonably in securing an appropriate education for their son outside the district. (At IDELR 1101) (Emphasis added.)

In *Bernardsville,* although the school district was on "notice" of the parent's dissatisfaction, a special education due process hearing was not requested for two years, a year beyond the statute of limitations. Like *James,* a clear obligation arose to offer an IEP from the date of the request.

> **We, of course, recognize that the school district has the duty in the first instance to provide an appropriate IEP,** and moreover, to demonstrate by a preponderance at a due process hearing that the IEP it offered was indeed appropriate. (At IDELR 1101)

In 1994, when the parents sought to return Joe to public school, they were rebuffed. Unlike *Bernardsville*, an IEP was never offered. The Third Circuit noted:

> Under the facts of this case in light of all the equities, recognizing the operative policies of the IDEA and acknowledging all relevant statutes and regulations, we believe that J.H.'s parents adequately placed in issue their dissatisfaction with J.H.'s IEP for purposes of reimbursement at the time they requested an administrative hearing in September of 1989. (At IDELR 1102)

Upper Arlington knew that the Jameses were dissatisfied with their son's education at Barrington. There is no split between *James* and *Bernardsville*.

Relying upon *M.C. v. Voluntown Board of Education*, 226 F.3d 60, 33 IDELR 91 (2d Cir. 2000) Upper Arlington School District asserts that the "Sixth Circuit has placed itself at odds with the Second Circuit." (Pet. 10) In *M.C.*, the parents sued the school district for private school tuition reimbursement and the costs of psychological counseling received during the 1995-1996 school year. On February 8, 1996, the IEP team convened and recommended that M.C. be placed on homebound instruction while new placements were explored. The parents did not voice dissatisfaction with the homebound placement nor did they request reimbursement for the counseling at

that meeting, or at a subsequent June 17, 1996, IEP meeting. When they requested the special education due process hearing, the parents did not request reimbursement for the private counseling.

Nearly one year later, "while the due process proceedings were pending, . . . **for the first time**, M.C.'s parents requested reimbursement for the services of Dr. Sheldon Gardner, a private psychologist . . ." (At 68) (Emphasis added.) The parents changed the issues and raised the stakes of the ongoing litigation. The Hearing Officer denied reimbursement. The Court of Appeals agreed, stating that equitable considerations barred the parents because they never notified "the school board of their dissatisfaction with their child's IEP." (*M.C.* at 68)

In *James*, the parents did not change the issues of the case nor did they raise the stakes. The Second Circuit's holding in *M.C.* is not in conflict with *James*.

Upper Arlington argues that *James* conflicts with the Eighth Circuit's ruling in *Schoenfeld v. Parkway Sch. Dist.*, 138 F.3d 379 (8th Cir. 1998). (Pet. 10) Scott Schoenfeld had not been found eligible for services under IDEA and had never had an IEP, either before or when the parents removed Scott from public school. Against the advice of Scott's private psychologist, his parents removed him from public school after the first day of the new school year. In *James*, there was no question that Joe had dyslexia and needed to be taught how to read, which Upper Arlington was either unable or unwilling to do.

Upper Arlington cites *Ash v. Lake Oswego Sch. Dist. No. 7J*, 980 F.2d 585, 19 IDELR 482 (9th Cir. 1992) as being in conflict with *James*. Christopher Ash attended a Montessori School for several years before he was placed in a private residential special education school by his parents in 1985. In 1989, the parents contacted the public school system to seek retroactive reimbursement for their son's education and prospective tuition. Christopher Ash had never attended public school. The District Court and Court of Appeals awarded prospective tuition for the residential placement but did not award retroactive tuition since the school district was unaware that they child existed. The facts in *Ash* are different from *James* and do not represent a split among circuits. The Court explained that September, 1989 was the first time that "LOSD had been asked to provide services to Christopher." (At IDELR 484)

After *Ash*, Upper Arlington School District argued that the Fourth Circuit's 1994 decision in *Combs* conflicts with *James*. *Combs* is simply an attorney fee case where the school district modified their program after the parents requested a special education due process hearing. The Court noted that "The School Board was not informed of Jeffory's difficulties until March of 1989, after Combs had initiated the administrative process . . . Thus, school officials had no notice of any problems nor any opportunity to address Combs' concerns before the administrative process." *Combs v. School Bd. of Rockingham County*, 15

F.3d 357, 20 IDELR 1246, 1249 (4th Cir. 1994) *Combs* is quite unlike *James*.

Upper Arlington School District argues that a split is created with the First Circuit in *Amann v. Stow Sch. Sys.*, 982 F. 2d 644, 19 IDELR 1024 (1st Cir. 1992). Upper Arlington implies that *James*, in conflict with *Amann*, requires "a school district to write IEPs for all special education children residing in the district regardless of where they go to school." (Pet. 17)

This was not the issue in *James*, nor was it the issue in *Amann*. In September 1987, the parent unilaterally removed Christopher from the public school program and placed him in the Carroll School. In 1989 the parents asked Stow to pay for Christopher's education at Carroll School. Stow declined, but did convene an IEP which the parents never accepted or rejected. The Court commented that the parents "postponed their decision until after Christopher had been evaluated, at Stow's expense, at Children's Hospital in Boston. In the meantime, Christopher finished fifth grade and entered sixth grade at Carroll School." (At 620)

Unlike Upper Arlington, the Town of Stow evaluated Christopher and convened an IEP meeting while Christopher was still enrolled in Carroll School. These facts are in direct contrast to the facts in *James*.

B. *James* Does Not Apply to Private School Children

The Petitioners have attempted to interject other issues about the special education rights of disabled children enrolled in private schools, who are not seeking to return to public school or receive tuition reimbursement. This was not an issue in *James* and was not an issue in the Courts of Appeal cases that allegedly "split" with *James*.

C. Ten Day Rule / "*Carter*" Amendment

Petitioner acknowledges that Congress amended the IDEA in 1997 and therefore the impact of this case only applies to cases begun before the 1997 amendment. The critical provision, nicknamed the "*Carter*" amendment, contains six elements. The parents (1) must give school districts advance notice that they (2) are rejecting the "placement proposed" by the school system. The "notice" (3) must include a statement of concerns and (4) intent to enroll their child in a private school (5) at public expense. The "notice" (6) must be given either "at the most recent IEP meeting that the parents attended prior to removal of the child from the public school," or "10 business days . . . prior to the removal of the child from the public school . . ." (20 U. S. C. § 1412(a)(10)(C))

Upper Arlington School District complains that "The amendment gives no guidance to the issues presented in *James*. The amendment only applies prospectively

and so does not address the plethora of pre-1997 cases currently pending in the courts about tuition reimbursement" (Pet. 14)

Upper Arlington School District fails to provide the citations to the "plethora of pre-1997 cases" because there is no "plethora." Indeed, the handful of cases that might be affected by a Supreme Court ruling in this case is shrinking by the day. This Court would be better advised to apply its limited resources to an issue of broader impact, one to which Congress has not already spoken.

While a number of courts have cited the statute as authority for awarding or denying reimbursement, none have had difficulty, confusion, or different interpretations about the statute. It is highly unlikely that the United States Courts of Appeal will need guidance interpreting the *"Carter"* amendment.

IV. CONCLUSION

After Joe was withdrawn from Upper Arlington public schools, the school district refused to develop an IEP unless the parents re-enrolled Joe. The Sixth Circuit explained that: "To hold otherwise would allow the school to slough off any response to its duty until the parents either performed the futile act of enrolling their son for one day and then withdrawing him as soon as the IEP was complete, or, worse, leaving the child in an arguably inadequate program for a year just to re-establish his legal rights. Neither

action seems to be compelled by the statutory scheme or the case law." (Pet. 7a)

The theme of the Petition by Upper Arlington School District is that a split has been created among the circuits and that the Sixth Circuit made an incorrect factual inference about the refusal to offer an IEP in 1994. The Court correctly found that Joe's parents wanted to return their son to the public school, while he continued to receive special education services, i.e., an IEP.

The Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully Submitted,

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